Petition

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

LIQUOR SALESMEN'S UNION OF THE STATE OF NEW YORK, LOCAL 2, DISTILLERY, RECTIFYING, WINE AND ALLIED WORKERS INTERNATIONAL UNION, AFL-CIO,
Petitioner,

v.

CHARMER INDUSTRIES, INC., STAR INDUSTRIES, INC., STANDARD WINE & LIQUOR CO., INC., PEERLESS IMPORTERS, INC., NATIONAL DISTILLERS DISTRIBUTING CO., PARK & TILFORD & MOTEL & CLUB, DIVISIONS OF KNICKERBOCKER LIQUORS CORP., and NATIONAL LABOR RELATIONS BOARD,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Is the National Labor Relations Board entitled to exercise its statutory authority under § 10(a) of the Act to remedy unfair labor practices, despite an arbitrator's rejection of a related contractual grievance, where the arbitrator did not decide whether there was an unfair labor practice, and the standards for resolving the grievance differ from the standards for determining whether an unfair labor practice has been committed?

2. When a court of appeals decides that the National Labor Relations Board has failed to apply the correct legal standards in refusing to defer to an arbitration award, does the court exceed its reviewing authority under the Act when it fails to remand the case to the Board and instead denies enforcement of the Board's order?

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LIQUOR SALESMEN'S UNION OF THE STATE OF NEW YORK, LOCAL 2, DISTILLERY, RECTIFYING, WINE AND ALLIED WORKERS INTERNATIONAL UNION, AFL-CIO,

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OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit denying enforcement of the Order of the National Relations Board ("Board") is reported at 664 F.2d 318 (1981) and is reproduced at pages 1a-22a of the separately bound Appendix to the Petition for Certiorari ("A."). The Court's order denying the petition for rehearing *en banc* appears at pp. 23a-24a of the Appendix.

The decision and order of the Board affirming the decision of the Administrative Law Judge is reported at 250 NLRB 293 (1980) and is reproduced at pp. 25a-30a of the Appendix, with the decision and recommended order of Administrative Law Judge Jennie M. Sarrica appearing at pp. 32a-54a thereof. The Board's prior Order Denying Motion for Summary Judgment and Directing Hearing appears at pp. 55a-57a of the Appendix. The Opinion and Award of Arbitrator Arthur T. Jacobs are reproduced at pp. 58a-66a of the Appendix.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on July 29, 1981. Local 2 filed a timely Petition for Rehearing which was denied on October 5, 1981. By Order dated December 28, 1981, Justice Marshall granted an extension of time within which to file this Petition for Certiorari to and including February 17, 1982 (A. 67a). This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This case involves §§ 8(a)(1), 8(a)(5) and 10(a) of the National Labor Relations Act of 1947, as amended ("the Act"), 29 U.S.C. §§ 158(a)(1), 158(a)(5) and 160(a), which provide in pertinent part as follows:

> Section 8(a): It shall be an unfair labor practice for an employer—
>
> > (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 of this Act * * *
> >
> > * * *
> >
> > (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a) of this Act.
>
> * * *
>
> Section 10(a): The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8 of this Act) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise * * *

STATEMENT OF THE CASE

A. The 1975 Negotiations and the Companies' Unilateral Change in C.O.D. Collection Procedures

Petitioner ("Local 2"; "the Union") represents salesmen employed by the corporate respondents,[1] who are alcoholic beverage wholesalers in the New York City metropolitan area. (A. 3a, 4a, 38a). The wholesalers' truck drivers and helpers, represented by Local 816 of the International Brotherhood of Teamsters ("IBT Local 816"), were for many years required by the terms of their collective bargaining agreement to collect payment for merchandise upon delivery to C.O.D. customers (A. 4a, 38a-39a). The salesmen had no such collection duties (A. 4a, 39a).

In the fall of 1975, the wholesalers conducted simultaneous, but independent, negotiations for new collective agreements with Local 2 and IBT Local 816 (A. 4a, 39a-40a). A last-minute employer concession to IBT Local 816 resulted in the deletion of all references to collection duties from the new Local 816 contract; the wholesalers never informed Local 2 of this change, nor discussed any modification of collection procedures during their 1975 negotiations with Local 2 (*Id.*).

Nevertheless, immediately after the companies reached agreement with Local 2 on a new collective agreement, the companies unilaterally and without notice changed their C.O.D. collection procedures (A. 4a-5a, 40a-43a). The new procedures, designed to replace the collection duties previously performed by the drivers, required the salesmen to pick up payments prior to delivery from C.O.D. customers who wished prompt shipment of their orders (A. 4a-5a, 41a-44a).

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[1] Charmer Industries, Inc., Star Industries, Inc., Standard Wine & Liquor Co., Inc., Peerless Importers, Inc., National Distillers Distributing Co., and Park & Tilford & Motel & Club, Divisions of Knickerbocker Liquors Corp. (collectively referred to herein as "the wholesalers" or "the companies").

The salesmen immediately complained to Local 2 over the added time, burdens and danger occasioned by their new collection duties (A. 4a, 41a-45a).[2] Local 2 President Matranga thereupon warned the wholesalers that the unilateral change in C.O.D. collection methods and the salesmen's duties violated both the contract and the National Labor Relations Act (A. 6a).

B. The Proceedings Before the Arbitrator and the Board

After the companies refused to discuss the unilateral change in the C.O.D. collection procedures, Local 2 filed a § 8(a)(5) refusal-to-bargain unfair labor practice charge with the Board (A. 6a-7a). The Union thereafter withdrew that charge without prejudice and served a demand for arbitration upon the companies (*Id.*). When the wholesalers resisted arbitration by seeking a stay of the arbitration in federal district court, Local 2 filed an amended

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[2] The National Labor Relations Board Administrative Law Judge summarized the unwelcome burdens entailed by this unilateral change as follows:

> This change in the duties of Salesmen is not only very time consuming compared to the single phone call to place the order previously required, but also places the Salesman in the dangerous position of being on the streets while handling substantial funds, and requires added expenses in phone calls and transportation, and bank fees, while placing him in the unwelcome position with his customers of being a collection agent. (A. 44a-45a).

Arbitrator Jacobs also described the new system's adverse economic impact on the salesmen:

> To abandon these [C.O.D.] customers and seek to replace them with new accounts is not simple. It means often abandoning customers of long standing, whose financial difficulties may be temporary and who could eventually be excellent accounts again. It means too giving up steady repeat orders upon which they have long depended for part of their income. Moreover, he knows that if he does not service the C.O.D. account, a salesman for another wholesaler probably will. . . .
>
> To seek to replace them with new accounts is a gamble, which may pay off, and well, but again which may not, thereby leaving the salesman over all poorer. (A. 63a-64a).

§ 8(a) (5) charge which was deferred pending arbitration by a Regional Director of the Board upon issuance of the court's order directing the parties to arbitrate the C.O.D. collection dispute (A. 7a).[3]

The sole issue before arbitrator Arthur Jacobs was whether the new procedure for handling C.O.D. accounts violated the parties' 1975-1978 collective bargaining agreement (A. 58a). In his Opinion, Arbitrator Jacobs concluded that he could not find that the companies violated "either the direct wording of the contract or any meaningful concept of past practice. The contract contains no provisions governing C.O.D.s; nor does it contain a past practice clause." (A. 64a).[4] The arbitrator accordingly felt constrained to find that "the Employers did not violate their contract with Local 2 when they adopted their present C.O.D. procedures" (A. 66a).

Upon issuance of Arbitrator Jacobs' award, the Union asked the Board to resume processing its § 8(a) (5) unfair labor practice charge, and a complaint issued on the charge on August 31, 1977 (A. 8a-9a, 32a, 34a-35a).

Shortly thereafter, the companies moved the Board to grant summary judgment in their favor, on the grounds that Arbitrator Jacobs' prior award had disposed of the § 8(a) (5) issue raised by the General Counsel's complaint and was entitled to deference under the criteria established by the Board in *Spielberg Manufacturing Co.*, 112 NLRB 1080 (1955) (A. 56a). The Board denied the motion on November 14, 1977,

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[3] *Charmers Industries, Inc.* v. *Liquor Salesmen's Local 2*, 415 F. Supp. 781, 787 (S.D.N.Y. 1976).

[4] The arbitrator stated also that the salesmen were "basically independent entrepreneurs", and that the new system did not change past practice because salesmen were not "required" to collect on their C.O.D. accounts (A. 64a-65a).

> . . . for the reason that the Arbitrator's Award which is alleged to be dispositive of the matter demonstrates on its face that the Arbitrator ruled in favor of Respondents herein because the contract between the parties contained no provisions pertaining to the matters at issue herein, and that it precluded consideration of past practices relating to the matter. Hence, his award that the "Employers did not violate their contract with Local 2 when they adopted their present C.O.D. procedures," does not dispose of the unfair labor practice allegations of the complaint. (A. 56a-57a).

On September 21, 1979, a Board Administrative Law Judge ("ALJ"), found that the wholesalers had violated § 8(a)(5) of the Act by unilaterally modifying the method of payment collection from C.O.D. customers (A. 50a-51a). In her decision, the ALJ rejected the companies' defense that the Union had "waived" its right to notice of, and bargaining over, the changed collection procedures, thereby "relinquishing and abandoning" any unfair labor practice claim:

> . . . there is no suggestion of proof against Local 2's denial thereof that it had any knowledge at that time of the change in Local 816's contract; and no evidence Local 2 had knowledge of Respondents' decision to impose such duties upon the salesmen. When Local 2 became aware of the various memoranda and directives reflecting implementation of the change in the work of Salesmen, Local 2's President vigorously protested such unilateral action, alerting Respondents that it viewed such conduct as violative of the National Labor Relations Act and, thereafter, pursued avenues of legal recourse. (A. 47a-48a).[5]

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[5] The ALJ similarly found no merit in the wholesalers' related assertion that the salesmen were akin to independent contractors or entrepreneurs and thus not statutory employees entitled to the Act's protection (A. 48a).

The Board thereafter affirmed the ALJ's decision, and ordered the companies to cease and desist from refusing to bargain with Local 2 by making unilateral changes in terms and conditions of employment, to restore the *status quo ante* with respect to C.O.D. collection procedures, to make the salesmen whole for any economic losses suffered as a result of, and to rescind any disciplinary action based on, the change (A. 29a-30a, 53a-54a).

C. The Proceedings in the Court of Appeals

The wholesalers petitioned the Court of Appeals for the Second Circuit for review of the Board's Order (A. 11a). The Court of Appeals granted the Petition and denied enforcement of the Board's Order, declaring that the Board had "abused its discretion in not deferring to the arbitrator's award . . . ." (A. 3a).

The Court of Appeals reasoned that although Arbitrator Jacobs did not address the § 8(a)(5) allegation of a refusal to bargain over a unilateral change in working conditions, he "in substance" had "clearly decided" the statutory issue (A. 15a). The court's theory was that the arbitrator's interpretation of the contract and evaluation of past practice were "necessarily dispositive of the statutory issue" (*Id.*).

In the view of the court below, the Board "did not even decide whether the circumstances presented here warranted an exercise of its discretion in deferring to the arbitrator's award" (A. 18a). However, instead of remanding the case to the Board for application of the proper deferral standards, the court denied enforcement outright, noting that, in its opinion, enforcement in "so stale a dispute" would not serve "the ends of justice or the purposes of national labor law" (A.19a).

REASONS FOR GRANTING THE WRIT

I. THE CONFLICTS AMONG THE COURTS OF APPEALS WHICH HAVE REVIEWED BOARD REFUSALS TO DEFER TO ARBITRATION AWARDS NECESSITATE A DEFINITIVE RESOLUTION BY THIS COURT

A. The Board's Discretionary Arbitral Deferral Policy

Section 10(a) of the Act empowers the Board to adjudicate and remedy unfair labor practices regardless of "any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise. . . ." The Board has nonetheless taken the view that it retains considerable discretion under certain circumstances to defer to an arbitration award rendered pursuant to a collective bargaining agreement. In *Spielberg Manufacturing Co.*, 112 NLRB 1080 (1955), the Board enunciated its criteria for arbitral deferral, stating that it would, as a matter of discretion, defer to an arbitration award if "the proceedings appear to have been fair and regular, all parties had agreed to be bound, and the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the Act." *Id.* at 1082. This doctrine, as later elaborated by the Board in *International Harvester Co.*, 138 NLRB 923 (1962) was approved by this Court in *Carey* v. *Westinghouse Corp.*, 375 U.S. 261, 270-272 (1964).

This discretionary deferral doctrine is not without its limits. As the Board held in its most recent restatement of its policy of arbitral deference, the Board will not honor an arbitration awards under *Spielberg* "unless the unfair labor practice issue before the Board was both presented to and considered by the arbitrator." *Suburban Motor Freight, Inc.*, 247 NLRB No. 2, 103

LRRM 1113, 1114 (1980).[6] This limiting principle finds its roots in the statutory scheme, and specifically in § 10(a) of the Act. As this Court has made plain, should the Board and the arbitrator reach different conclusions in such an "overlapping" controversy, the Board's ruling "would, of course, take precedence." *Carey* v. *Westinghouse, supra,* 375 U.S. at 272. "The superior authority of the Board may be invoked at anytime." *Id.*

In the two decades following the Board's decision in *Spielberg*, the above deferral criteria have been tightly woven into the fabric of national labor law and policy. As detailed below, however, despite the surface acceptance of the Board's standards for arbitral deferral by the appellate courts (including the court below), Board deferral cases have met with widely varying and conflicting fates in the Courts of Appeals. As an ironic consequence of this appellate disharmony, the arbitral deferral process now breeds the very type of proliferating litigation and labor relations instability the doctrine aims to avoid.[7] Absent a definitive resolution of this issue by this Court, parties who believe that they have been aggrieved by both a statutory violation and a breach of contract will be discouraged from pursuing arbitration, because they will fear that this will undermine their efforts to obtain relief under the statute. *Cf. Alexander* v. *Gardner-Denver Co.,* 415 U.S. 35, 59 (1974).

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[6] The Board recognized that a contrary rule would force a grievant "to seek simultaneous vindication of private contractual rights and public statutory rights, or risk waiving the latter." *Id. Cf. Barrentine* v. *Arkansas-Best Freight System,* 450 U.S. 728, 743-746 (1981); *Alexander* v. *Gardner-Denver Co.,* 415 U.S. 36, 49-50, 59-60 (1974).

[7] Board deferral to arbitration gives "hospitable acceptance to the arbitral process" in order to promote industrial peace and stability and encourage dispute resolution whenever possible through the machinery of arbitration. *International Harvester Co., supra,* 138 NLRB at 926-927.

B. The Decision Below Conflicts With Persuasive Appellate Authority And Reflects The General Disarray Of The Courts Of Appeals On This Issue

The reversal by the Second Circuit of the Board's refusal to defer to the arbitration award is squarely at odds with a well-reasoned decision on point by the Ninth Circuit, *Alfred M. Lewis, Inc.* v. *N.L.R.B.*, 587 F.2d 403 (1978), *affirming in relevant part* 229 NLRB 757 (1977). The employer in *Lewis* unilaterally instituted two new production quota systems without prior notice to, or bargaining with the union. The union took the company to arbitration twice over the new system, only to have both arbitrators rule that the company "had a right to adopt unilaterally production quotas . . . because the contract did not specifically limit or restrict such actions." 229 NLRB at 757.

In ruling upon a subsequent § 8(a) (5) complaint based on the unilateral imposition of the quota systems, a Board Administrative Law Judge held that the arbitrators' awards were entitled to deference under *Spielberg*, particularly in view of the fact that the union had expressly tendered its § 8(a) (5) claim to at least one of the arbitrators. 229 NLRB at 764-765; 587 F.2d at 407. The ALJ further concluded that introduction of the second system did not violate § 8(a) (5) because the system did not represent a "material change" from the system previously in place. 229 NLRB at 767; 587 F.2d at 407.

The Board reversed the ALJ's decision to defer, and, upon reaching the § 8(a) (5) issue, concluded that the company had violated the Act. On appeal, the Ninth Circuit agreed with the Board's reasoning that deferral was improper because "the arbitrators ignored well-established principles of labor law" developed under § 8(a) (5), which require bargaining prior to instituting a unilateral change in a term and condition of employment. 587 F.2d at 407-408. The court dismissed without hesitation the company's argument that the union's decision to arbitrate its claim of contract breach excused the company from its § 8(a)(5) duty to bargain or precluded the filing of a § 8(a)(5) unfair labor practice charge:

> An essential aspect of the Union's role in collective bargaining is its right to be consulted by the employer about mandatory subjects of bargaining and to make comments, objections, or suggestions to the employer before action is taken. This is a practical mechanism to insure the stability of industrial relations. The Board correctly held that the employer disregarded it here. It would wholly undercut the duty to bargain if the employer were allowed to act with reference to a mandatory bargaining subject and then simply defend its actions in a later arbitration hearing. [587 F.2d at 407]

The conflict between the decision below and that of the Ninth Circuit in *Lewis* is the clearest example of disarray among the courts of appeals on the subject of the Board's deferral to arbitration, but there is abundant other evidence as well. In the Third Circuit alone the judges have expressed a wide variety of views. In *N.L.R.B.* v. *Pincus Brothers, Inc.-Maxwell,* 620 F.2d 367 (1980), a panel decision reversing the Board's refusal to defer produced three divergent opinions. Judge Rosenn's view was that "where there are two arguable interpretations of an arbitration award, one permissible and one impermissible, the Board *must* defer to the decision rendered by the arbitrator." 620 F.2d at 377 (emphasis supplied). But Judge Garth's concurring opinion therein argued that the "Board's deference decisions must be reviewed under a standard of legal error," not abuse of discretion (*id.*), while Judge Gibbons in dissent was of the view that the Board lacked the statutory power to defer. *Id.* at 384-385. However, in *Hammermill Paper Co.* v. *N.L.R.B.,* 658 F.2d 155, 159-160 (1981), and *N.L.R.B.* v. *General Warehouse Corp.,* 643 F.2d 965, 969 (1981), that court concluded that the Board properly refused to defer to an arbitration decision because the arbitration case was litigated solely as a contractual "just cause for discipline" matter, with the legal standard embodied in § 8(a)(3) never raised by the parties—a judicial approach consonant with *Lewis* but wholly inconsistent with the Second Circuit's decision in the case *sub judice.*

Other courts of appeals have also approved the Board's refusal to defer under circumstances indistinguishable from the present case. In the Tenth Circuit, an arbitrator's award which "clearly ignores" Board and court precedent warrants no deference, *N.L.R.B.* v. *Gould, Inc.*, 638 F.2d 159, 166 (1980), cert. denied *sub nom. Brown Boveri Electric, Inc.* v. *NLRB*, 101 S. Ct. 3065 (1981), while an arbitrator's failure to "discuss thoroughly" the statutory issue precludes deference in the Seventh. *St. Luke's Memorial Hospital, Inc.* v. *N.L.R.B.*, 623 F.2d 1173, 1178 (1980). Finally, the First Circuit Court of Appeals requires a showing that the arbitrator conducted an "individualized analysis" of each separate statutory issue as a condition precedent to deference:

> It is not enough that the parties raised the statutory issues before the arbitrator and that one might decide that he considered those issues by virtue of the fact that he chose instead to rest his decision on contractual grounds. Where the arbitrator has no duty to consider the statutory issues, it would undermine the purpose of the Act to require the Board to defer merely on the speculation that he must have considered an employee's rights under the statute. [*Pioneer Finishing Corp.* v. *N.L.R.B.*,—F.2d—, 109 LRRM 2112, 2115 (1981).]

C. The Decision Below Misconceives the Law Under §§ 8(a)(5) and 10(a) of the Act

1. *Section 10(a)*

While paying lip-service to the Board's deferral requirement that the arbitrator have "clearly decided"[8]

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[8] As the Ninth Circuit has explained:

> The "clearly decided" requirement means that the arbitrator's decision must specifically deal with the statutory issue. Merely because the arbitrator is presented with a problem which involves both contractual and unfair labor practice elements does

the statutory issue, the Second Circuit here in fact impermissibly formulated its own standards for deferral and determined *de novo* whether Arbitrator Jacobs' opinion met them, thereby invading the exclusive province of the Board.

The court below patently failed to heed the language of the Act and this Court's admonition that "the business of the Board . . . is to adjudicate and remedy unfair labor practices," *NLRB* v. *Strong*, 393 U.S. 357, 360 (1969), and that arbitral deferral is purely a policy of administrative discretion to be exercised in strict conformity with that overriding statutory duty. *Carey* v. *Westinghouse Corp., supra,* 375 U.S. at 270-272. *See also, Stephenson* v. *N.L.R.B.*, 550 F.2d 535 (9th Cir., 1977); *Banyard* v. *N.L.R.B.*, 505 F.2d 342 (D.C. Cir. 1974). The Board's carefully circumscribed discretional deferral policy properly insures that its ability fully to meet its statutory duties is not fettered by arbitral awards issued under a private system of dispute resolution, for

> [t]he Board . . . does not exist for the "adjudication of private rights;" it "acts in a public capacity to give effect to the declared public policy of the Act to eliminate and prevent obstructions to interstate commerce by encouraging collective bargaining." [*Phelps Dodge Corp.* v. *Labor Board*, 313 U.S. 177, 193 (1941), quoting *National Licorice Co.* v. *Labor Board*, 309 U.S. 350, 362 (1940).]

The Second Circuit's stark second-guessing of the Board's decision here to carry out its statutory mandate

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> not necesarily mean that he will adequately consider the statutory issue, and merely because he considers the statutory issue does not mean that he will enforce the rights of the parties pursuant to and consistent with the Act. The "clearly decided" requisite is designed to enable the Board and the courts to fairly test the standards applied by the arbitrator against those required by the Act. [*Stephenson* v. *N.L.R.B.*, 550 F.2d 535, 538 n.4 (9th Cir., 1977).]

of adjudicating refusal-to-bargain complaints overrides these principles. In so doing, the court below turned the *Spielberg/Suburban* doctrine, which the court purported to accept, squarely on its head, by *requiring* the Board to engage in the very "impermissible delegation of the Board's exclusive jurisdiction under Section 10(a) of the Act to decide unfair labor practice issues" to a private arbitrator, which the Act forbids the Board to do. *Suburban Motor Freight Co., supra,* 103 LRRM at 1114. As a result, the Second Circuit has created a powerful incentive for constant appellate litigation in the deferral context, while simultaneously dissuading aggrieved parties from availing themselves of arbitral remedies out of a fear that subsequent relief under the Act will thereby be precluded. *Cf. Alexander* v. *Gardner-Denver Co., supra,* 415 U.S. at 59.

2. *Section 8(a)(5)*

The Second Circuit compounds its misunderstanding of § 10(a) of the Act by committing a patent error in its reading of § 8(a)(5). Contrary to the court below, the contract principles applied by arbitrators, and the governing law under § 8(a)(5) enforced by the Board with respect to unilateral changes in terms and conditions of employment, are *not* congruent. An employer's unilateral change may, under the circumstances presented by this case, violate § 8(a)(5) even though the change neither breached the contract nor trangressed an express or implied past practice. *C & C Plywood Corp.,* 148 NLRB 414 (1964), *aff'd,* 385 U.S. 421 (1967). As the Board recognized in *C & C,*

> In filing its unfair labor practice charge, the Union was complaining not of a violation of its contract with Respondent, but of the invasion of its statutory right as collective bargaining representative of employees in the unit to bargain about any change in the terms and conditions of employment for such employees. *Prima facie,* Respondent's change in the terms [of

> employment] without notification to, or bargaining with, the Union violated Section 8(a)(5). [148 NLRB at 415 (footnotes omitted).]

See also, Alfred M. Lewis v. *N.L.R.B.*, quoted above at p. 11.

Unlike the court below, the Board in *C&C* and the *Lewis* court were properly attentive to the command of § 8(a)(5) and the bargaining duty it imposes independent of any contract provisions. As this Court has only recently reemphasized, "The Act was framed with an awareness that refusals to confer and negotiate had been one of the most prolific causes of industrial strife." *Ford Motor Co.* v. *NLRB*, 441 U.S. 488, 502 n. 14 (1979), quoting *Fibreboard Corp.* v. *Labor Board*, 379 U.S. 203, 211 (1964). *See also, Labor Board* v. *Katz*, 369 U.S. 736 (1962).

Ford Motor highlights the Second Circuit's failure to proceed in accord with these premises of national labor policy. In the eyes of the court below, the unilateral imposition of new C.O.D. collection procedures and duties was a trivial matter, and the tenacity with which Local 2 fought to reverse this "minor" instance of unilateral conduct for over six years merely a cause for incredulity.[9] The analysis mandated by the Act and this Court's pronouncements in the § 8(a)(5) context, however, is precisely the opposite. The Union's struggle was triggered by the companies' conceded refusal to bargain over the new collection system; that the members of Local 2 cared enough about the issue to pursue every avenue of legal recourse only reinforces the soundness of the statutory policy underpinning § 8(a)(5) and the Board's finding of an unlawful refusal to bargain here. Given the intensity of the dispute, "It follows that more, not less, collective bargaining is the remedy. This is the assumption of national labor policy, and it is soundly supported by both reason and experience." *Ford Motor Co., supra,* 441 U.S. at 502.

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[9] The attitude of the Second Circuit distressingly echoes Ford's specious defense that "in plant food prices and service are too trivial to qualify as mandatory [bargaining] subjects", *Ford Motor Co., supra*, 441 U.S. at 500-501.

The Act thus imposes a duty upon an employer, and a correlative right upon a union, to bargain about proposed changes in terms and conditions of employment totally apart from the parties' contractual rights and obligations. For this reason, an employer can unilaterally institute such a change only upon a showing that the union "clearly and unmistakeably waived" this vital statutory right, a waiver which will "not lightly be inferred." *C & C Plywood, supra,* 148 NLRB at 416. Mere silence can never give rise to such a waiver (*OPEIU Local 425* v. *N.L.R.B.*, 419 F.2d 314, 321 (D.C. Cir. 1969)), nor is a "mere inference, no matter how strong," sufficient. *N.L.R.B.* v. *Die Supply Corp.*, 393 F.2d 462 (1st Cir. 1968).

The record in the instant case leaves no room for a finding of waiver by Local 2—not only was the subject of C.O.D. collections not covered by the contract and unmentioned during bargaining, but the wholesalers deliberately withheld from the Union the deletion of the C.O.D. collection duties from the new IBT Local 816 contract until after the companies had reached agreement with Local 2. *Charmers Industries, Inc.* v. *Liquor Salesmen's Union Local 2, supra,* 415 F.Supp. at 783; A. 40a.

Despite the absence of any finding by either the arbitrator, the ALJ, the Board, or the court itself of a waiver by Local 2 of its statutory right to bargain over the imposition of the onerous C.O.D. collection system, the Second Circuit erred as a matter of law by deciding the case as if no such statutory right existed, or as if the Union in any event had expressly waived the right. One vainly searches Arbitrator Jacobs' opinion for any mention of the statutory protections guaranteed the Union by § 8(a)(5) of the Act, much less any analysis of these statutory protections. *Contrast, Ad Art, Inc.* v. *N.L.R.B.*, 645 F.2d 669

(9th Cir. 1980), where the Ninth Circuit approved the Board's refusal to defer absent such analysis by the arbitrator. Indeed, on this record, had Arbitrator Jacobs directly addressed the § 8(a)(5) issue and found a clear and unmistakable waiver by Local 2, his award would have on that ground alone been repugnant to the Act and entitled to no deference, as it would have improperly "ignored well-established principles of labor law." *Alfred M. Lewis* v. *N.L.R.B.*, *supra*, 587 F.2d at 407-408. "Notice of a *fait accompli* is simply not the sort of timely notice upon which a waiver defense is predicated." *International Ladies' Garment Workers Union* v. *N.L.R.B.*, 463 F.2d 907, 919 (D.C. Cir., 1972).

II. OUTRIGHT REVERSAL INSTEAD OF A REMAND WAS IN ANY EVENT MANIFEST ERROR

The Court of Appeals in this case took the Board to task for failing to apply the proper deferral standards; in fact, according to that court, the Board did not apply any deferral criteria at all. But, as the Second Circuit conceded, the determination as to whether, and under what criteria, the Board should exercise its discretion to defer is committed to the Board in the first instance. Whether or not the court was correct in its view that the Board had applied the wrong deferral standards, or had failed to rely on any standards at all, for the court "to take upon itself the initial determination of this issue was 'incompatible with the orderly function of the process of judicial review.'" *South Prairie Constr. Co.* v. *Operating Engineers*, 425 U.S. 800, 805 (1976), quoting *NLRB* v. *Metropolitan Ins. Co.*, 380 U.S. 438, 444 (1965). *See also*, *NLRB* v. *Food Store Employees*, 417 U.S. 1, 9 (1974). A remand, and not an outright denial of enforcement for failure to adhere to the guiding legal principles was accordingly the required course for the reviewing court. *Id.*

Finally, we note that, to the extent the Second Circuit independently denied enforcement on the ground that to do so in such a "stale" dispute would disserve the ends of justice and the policies of the federal labor laws, its holding likewise constituted reversible error, particularly where, as here, the bulk of the delay can be laid on the doorstep of the companies, who unlawfully refused to bargain in the first place and then strenuously resisted arbitration. *See, e.g., NLRB* v. *Rutter-Rex Mfg. Co.*, 396 U.S. 258, 259, 265-266 (1969) (delay in the administrative process furnishes no independent justification for modifying Board order); *Labor Board* v. *Katz, supra*, 369 U.S. at 748, n.16 (changed circumstances and intervening events afford no basis upon which to deny enforcement).

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix

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81-1544

No.

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In The
Supreme Court of the United States
October Term, 1981

Liquor Salesmen's Union of the State of New York, Local 2, Distillery, Rectifying, Wine and Allied Workers International Union, AFL-CIO,
Petitioner,

v.

Charmer Industries, Inc., Star Industries, Inc., Standard Wine & Liquor Co., Inc., Peerless Importers, Inc., National Distillers Distributing Co., Park & Tilford & Motel & Club, Divisions of Knickerbocker Liquors Corp., and National Labor Relations Board,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 961—September Term, 1980

(Argued April 10, 1981 Decided July 29, 1981)

Docket No. 80-4264

LIQUOR SALESMEN'S UNION LOCAL 2 OF THE STATE OF NEW YORK, DISTILLERY, RECTIFYING, WINE & ALLIED WORKERS' INTERNATIONAL UNION, AFL-CIO,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

CHARMER INDUSTRIES, INC., STAR INDUSTRIES, INC., STANDARD WINE & LIQUOR CO., INC., PEERLESS IMPORTERS, INC., and NATIONAL DISTILLERS DISTRIBUTING CO.,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PARK & TILFORD & MOTEL & CLUB,
DIVISIONS OF KNICKERBOCKER LIQUORS CORP.,
Petitioners,
v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,
and

LIQUOR SALESMEN'S UNION LOCAL 2,
Intervenor.

Before:

FEINBERG, *Chief Judge,*
WATERMAN and VAN GRAAFEILAND, *Circuit Judges.*

Petitions for review and cross-application for enforcement of order of the National Labor Relations Board, based on a finding that petitioning companies unilaterally changed working conditions in violation of a collective bargaining agreement and sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act.

Petitions granted and enforcement denied on the ground that the Board abused its discretion in declining to defer to an arbitrator's award.

ALLEN B. ROBERTS, New York, NY (Jones, Hirsch, Kalman & Bloom, New York, NY, of counsel) and MORTON SCHIMMEL, New York, NY, *for petitioners Charmer Industries, Inc., et al.*

CHARLES O. STRAHLEY, New York, NY (Putney, Twombly, Hall & Hirson, New York, NY, of counsel), *for petitioner Knickerbocker Liquors Corp.*

---

* Honorable Jacob Mishler, Senior United States District Judge, Eastern District of New York, sitting by designation.

VICTOR FEINGOLD, New York, NY, *for petitioner-intervenor Liquor Salesmen's Union Local 2.*

MIRIAM SZAPIRO, Attorney, National Labor Relations Board, Washington, DC (William A. Lubbers, General Counsel, John E. Higgins, Jr., Deputy General Counsel, Robert E. Allen, Acting Associate General Counsel, Elliott Moore, Deputy Associate General Counsel, Andrew F. Tranovich, Attorney, National Labor Relations Board, of counsel), *for respondent National Labor Relations Board.*

FEINBERG, *Chief Judge*:

This case, incredibly, arises out of an alleged unilateral change of work rules in 1975 by six liquor wholesalers ("the companies") in breach of their respective collective bargaining agreements with the union representing their salesmen-employees. The dispute was submitted to an arbitrator, who found that the agreements had not been violated. Dissatisfied with this conclusion, the union succeeded in bringing the case before the National Labor Relations Board, which declined to defer to the arbitrator's award under the policy of deference first announced in Spielberg Manufacturing Co., 112 N.L.R.B. 1080 (1955). Instead, the Board found that the companies had committed an unfair labor practice and issued a remedial order. Under the circumstances presented here, we conclude that the Board abused its discretion in not deferring to the arbitrator's award, and we deny enforcement of the Board's order.

I. *Prior Proceedings*

The companies are engaged in the wholesale distribution of alcoholic beverages to restaurants, bars, liquor stores, and the like in the New York City metropolitan area. These salesmen, who work on a commission basis, are represented by petitioner-intervenor Liquor Salesmen's Union Local 2 of the State of New York, Distillery, Rectifying, Wine & Allied Workers' International Union, AFL-CIO.[1] The companies' drivers are represented by Local 816 of the International Brotherhood of Teamsters, which is not a party to this litigation.

Collective bargaining agreements between the companies and the two unions were due to expire on October 31, 1975; as that date approached, negotiations of new agreements occurred simultaneously, but independently of each other. Under the expiring agreement between the companies and the drivers' union, the drivers bore responsibility for the collection of payment from all C.O.D. customers at the time of delivery. In the closing hours of negotiations over the new agreement, the companies agreed to free the drivers of this task. They did not inform Local 2 of this change, however, and negotiations between the companies and that union did not address the subject of collections before tentative accord on a three-year contract was reached on November 2, subject to ratification by the Local's members.

On November 3, officials of one of the companies, Peerless Importers, Inc., distributed to its salesmen a handwritten directive on the handling of C.O.D. accounts, stating that customers could mail checks or that salesmen could pick the checks up from the customers and bring them to the office, after which the order would be shipped. Caught short by these new procedures, several C.O.D. customers complained to the salesmen when they did not receive their deliveries. The salesmen, in turn, complained to their union about the added burden being placed on them.

By the time of the Local 2 ratification meeting on November 7, the union was aware of the change in collection procedures. At the meeting, the president of Local 2 spoke to the salesmen about the change:

---

[1] For convenience, we will sometimes refer to petitioner-intervenor as Local 2 or the union.

> Without prior discussion with the union, some employees circulated photocopies of a handwritten instruction that salesmen are to pick up C.O.D. payments in the form of checks or otherwise in order to have the orders filled. This is a violation of our contract, and I direct you that this change in our work rules shall not be honored by you until further notice. I instruct you to disregard it, and I will so advise your employer.

With this instruction given, the salesmen proceeded to ratify the new agreement without further consideration of the collection issue.

Shortly thereafter, each of the companies circulated announcements to its salesmen outlining and clarifying the new procedures. With variations from company to company, the new procedures generally encompassed three options. First, customers could mail in checks, with delivery taking place upon receipt; this procedure involved a delay of three days or so. Second, customers could leave signed blank checks with the companies, lessening the delay in delivery though obviously creating other problems of security. Third, customers could give checks directly to the salesmen, who could either bring the checks in immediately or call in the check number and amount, turning in the actual check the next day.

The companies generally took pains to stress the freedom of the salesmen to choose any procedure they wished, asserting that it was the individual salesman's "prerogative" to pick up payment rather than adopt an alternative that involved less of a burden. There was, on the other hand, some evidence of pressure on the salesmen to collect the checks themselves. The salesmen moreover, argue that economic realities made it essential that they handle the collections personally. Since the business is highly competitive, they point out, an unwillingness by one salesman to pick up payment and thus to permit same-day delivery will simply lead his customer to turn elsewhere. As the arbitrator observed, "[t]he sad fact from the salesman's point of view is that, except for a small number with exclusive rights to a few brands, each salesman generally competes with the salesmen representing other wholesalers, all selling the same brands at the same prices."

On November 12, 1975, Local 2 president Joseph Matranga sent a letter to the companies asserting that the companies had "unilaterally and without notice changed a very serious working condition that has existed for many years in the industry and which is raising havoc with the rights of our members in the pursuit of their occupation." The letter claimed that "some or all of the employers have instructed the employees to pick up payment in advance from all customers who are on a Cash or COD basis." Citing the dangers and burden thus imposed, and charging that the employers were violating both the National Labor Relations Act and their contracts, Matranga said he would "be available immediately at my office for an open and frank discussion of this matter in order to avoid a confrontation on this issue." On the same day, however, Matranga wrote the companies' counsel, enclosing a final draft of the new contract and asking him for his approval of the draft so that copies could be prepared for formal signature.

Replying to the former letter the next day, counsel for the companies suggested that Matranga was "attempting to renegotiate the Teamsters', Local 816 contract," and denied that the employers had changed a working condition unilaterally and without notice. The union's response was prompt: the following day, Matranga filed unfair labor practice charges against one of the companies with the NLRB, alleging that the change in "work rules" constituted an unfair labor practice under sections 8(a) (1) and 8(a) (5) of the National Labor Relations Act, 29 U.S.C. §§ 158(a) (1), (a) (5). Soon thereafter, however, the union withdrew the charges and in February 1976 served on the companies a notice of intention to arbitrate, in accordance with the arbitration provision of the collective bargaining agreements. When the companies resisted arbitration, the union reinstated charges against all of them in March 1976, adding a charge of refusal to submit to arbitration. The Board's Regional Director, however, deferred action on the charges pending resolution of the requested arbitration proceedings. The companies' effort to avoid arbitration finally failed on June 1976, when Judge Charles S. Haight, Jr., of the United States District Court for the Southern District of New York denied their motion for a stay of arbitration and granted the union's cross-motion to compel the arbitration. Charmers Industries, Inc. v. Liquor Salesmen's Union Local No. 2, 415 F. Supp. 781, 787 (S.D.N.Y. 1976).

The arbitration then took place under the auspices of the New York State Mediation Board, culminating in an award by arbitrator Arthur T. Jacobs dated April 7, 1977. In a careful opinion, the arbitrator concluded that "[t]he Employers did not violate their contract with Local 2 when they adopted their present C.O.D. procedures." He noted, first, that the bargaining agreements contained no provisions governing C.O.D. procedures, so that there had been no violation of the agreements' "direct wording." He also found no violation of "any meaningful concept of past practice," observing:

> In the absence of a past practice clause, arbitrators including this one, and the courts have nevertheless frequently found that past practice was significantly implied in the contractual relations involved and could be used to justify a decision and an award.
>
> I cannot so find here for several reasons which stem from the limitations of the contract. First, the salesmen although called employees are basically independent entrepreneurs (like manufacturer representatives) . . . .

> Past practice in the industry did not require the salesmen to collect on their C.O.D. accounts. Present practice is the same. It is the individual salesman who decides for himself whether to do so or not. If he decides to collect, then it is he who is going contrary to past practice and deliberately so. The companies are being consistent. They did not require salesmen to pick up C.O.D.'s prior to November 1, 1975 and they have told the salesmen consistently since that they are not obligated to do so.
>
> In the light of this very special employee status and of the companies' care to emphasize to the salesmen from November 2, 1975 on that whether or not they serviced C.O.D. accounts was entirely their prerogative, it is impossible to find that the companies have been directing or ordering or mandating that the salesmen must service C.O.Ds.

Addressing the union's contention that the salesmen's "prerogative" to collect or not to collect was illusory, since economic reality made collections necessary, the arbitrator stated:

> The Union's argument that the wholesalers are engaging in a "sham," while conceivably true, was not proved by the testimony. The many salesmen who testified only proved what I just described: an industry where although they are represented by the same Union, each company's salesmen compete against the salesmen of the other wholesalers and as a group they have been unwilling or unable to require all of the Union's members to forego collections on C.O.D. accounts and to force such accounts to pay for their goods by themselves delivering or mailing cash, a money order, or a certified check to the companies.

The union promptly applied to the Board's Regional Director to re-initiate proceedings to consider the charges filed in March 1976. The Regional Director, however, refused to issue a complaint against the companies. Citing the Board's practice under *Spielberg* of deferring to arbitration awards that meet certain conditions, the Director noted:

> In the instant case, there is no evidence that the arbitration proceedings were not fair or regular. Moreover, the evidence indicates that all parties and their counsel participated in the proceedings and the arbitrator was aware of the unfair labor practice issue. While the arbitrator's award may not be the one the Board would issue, where the *Spielberg* standards discussed above are met and the result is not clearly repugnant to the Act, the Board defers to the decision of the arbitrator [citation omitted].

The Director distinguished the decisions cited by the union to justify setting aside the ward on the ground that they had not been cases in which an arbitrator's award "deal[t] squarely with the substance of the asserted violations of Section 8(a)(5)." Finally, in declining to issue a complaint, he specifically found that the award was "not clearly repugnant to the policies or purposes of" the NLRA.

Aggrieved once again, the union appealed to the Board's General Counsel, who reversed the Regional Director's decision and instructed him to issue a complaint. The Director did so, and shortly thereafter, the companies moved for summary judgment on the basis of the arbitration award, citing the Board's policy of deference to such awards under *Spielberg*. In an order dated November 14, 1977, the Board denied the motion, giving only the following explanation of its decision not to defer to the award:

> The Board, having duly considered the matter, is of the opinion that Respondents [i.e., the companies] are not entitled to summary judgment . . . for the reason that the Arbitrator's Award which is alleged to be dispositive of the matter demonstrates on

> its face that the Arbitrator ruled in favor of respondents herein because the contract between the parties contained no provisions pertaining to the matters at issue herein, and that it precluded consideration of past practices relating to the matter. Hence, his award that the "Employers did not violate their contract with Local 2 when they adopted their present C.O.D. procedures," does not dispose of the unfair labor practice allegations of the complaint.

The Board ordered a hearing before an administrative law judge (ALJ), which took place in March 1978.

While the case was pending before the ALJ, the expiration date of the 1975 contracts approached. We were informed at oral argument that the parties returned to the bargaining table to negotiate new agreements and that the C.O.D. collection procedures were a subject of the bargaining; apparently, the union was unable to persuade the companies to change the practice developed under the 1975 contracts, which has therefore remained essentially unchanged.

In September 1979, the ALJ issued a 19-page decision in favor of the union—more than a year and a half after the hearing. The ALJ found that the companies had "made unilateral changes with respect to the terms and conditions of employment of [the] employees, and thereby refused to bargain and continue to refuse to bargain in violation of Section 8(a)(5) and (1) of the Act." The ALJ did not directly address the reasoning or conclusion of the arbitrator, asserting only that the Board's refusal to defer to the award was binding on her as the law of the case.

By a decision and order dated June 30, 1980—nine months after the ALJ's decision and more than four and a half years after the events giving rise to the complaint—the Board affirmed the rulings, findings, and conclusions of the ALJ and adopted her recommended order, with certain modifications. The Board's remedy included a general order that the companies cease and desist from refusing to bargain with the union by making unilateral changes in working conditions. At a more concrete level, the Board also ordered the companies to "restor[e] the *status quo ante* to those conditions which obtained prior to November 1, 1975 with respect to delivery schedules and collections of prepayments for C.O.D. orders as they related to the working conditions of Salesmen"; to make the salesmen whole for any lost time or added expense resulting from the change in working conditions; and to rescind any disciplinary action taken against salesmen because of lost commissions or accounts. See Charmer Industries, Inc., 250 N.L.R.B. No. 31 (June 30, 1980).

One month later, the companies petitioned this court for review of the Board's order; the Board cross-applied for enforcement of the order. Local 2, however, had not been idle, filing its own petition for review of the order on July 3, 1980, in the United States Court of Appeals for the District of Columbia Circuit. The union's petition sought review of the Board's failure to address—and thus its implicit denial of—the union's request for attorneys' fees as part of the remedial order. On March 31, 1981, a panel of the District of Columbia Circuit Court exercised its discretion under 28 U.S.C. § 2112(a) to transfer the union's petition to this court for disposition in conjunction with the companies' petitions. Liquor Salesmen's Union Local 2 v. NLRB, No. 80-1746, slip op. at 15-19 (D.C. Cir. Mar. 31, 1981).

Thus, after five years and five months, this dispute over an alleged failure to bargain in 1975 came before this court.

II. *The Board's Deference Criteria*

As will be seen below, the only substantive issue we find it necessary to reach in this case is whether the Board abused its discretion in declining to defer to the arbitrator's award.

In furtherance of the national labor policy goal of encouraging the voluntary settlement of industrial disputes through arbitration, the National Labor Relations Board announced in 1955 that it would defer, as a matter of discretion, to an arbitrator's award pursuant to the provisions of a collective bargaining agreement in cases in which "the proceedings appear to have been fair and regular, all parties had agreed to be bound, and the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the [National Labor Relations] Act." Spielberg Manufacturing Co., supra, 112 N.L.R.B. at 1082. This policy of deference—the *Spielberg* doctrine—obtained Supreme Court sanction in Carey v. Westinghouse Corp., 375 U.S. 261, 270-72 (1964).

Over the years, the number and nature of the criteria applied to deference decisions have changed. The concept of "clearly repugnant," for example, has proved elusive, with the Board and courts viewing it sometimes as a test of whether the arbitrator's award was "palpably wrong," see, e.g., International Harvester Co., 138 N.L.R.B. 923, 929 (1962), enf'd sub nom. Ramsey v. NLRB, 327 F.2d 784 (7th Cir.), cert. denied, 377 U.S. 1003 (1964); or not "consistent with Board law," see, e.g., Kansas City Star, Inc., 236 N.L.R.B. 866, 869 (1978) (Member Truesdale, concurring); or "arguably . . . not inconsistent with Board policy," see NLRB v. Pincus Brothers, Inc.-Maxwell, 620 F.2d 367 (3d Cir. 1980).[2]

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[2] The Board's shifting application of the "clearly repugnant" standard has particularly vexed Member Penello. See, e.g., Atlantic Steel Co., 245 N.L.R.B. No. 107, slip op. at 13 (Member Penello, concurring) (Sept. 28, 1979); Sea-Land Service, Inc., 240 N.L.R.B. 1146, 1151 (1979) (Member Penello, dissenting).

On the "clearly repugnant" controversy, see generally Note, Limiting Deferral Under the *Spielberg Doctrine*, 67 U. Va. L. Rev. 615, 621 (1981) ("The 'clearly repugnant' standard appears to be more literal than actual, . . . for the Board rarely defers unless the award comports with the Board's opinion as to the proper result [footnote omitted].").

In addition, the Board has followed an on-again, off-again requirement that the arbitrator have "clearly decided" the statutory issues involved in the unfair labor practice charge as well as the purely contractual issues presented under the terms of the collective bargaining agreement. One of the union's principal arguments is that this case "presents a classic example of an Arbitrator's refusal to address himself to the issues raised by the unfair labor practice case." The arbitrator, the union asserts, "completely failed to pass on the statutory issue, to wit, that the salesmen can no longer enjoy the same prompt delivery for C.O.D. sales and credit sales without assuming the added burdens of a collection agent; and whether the employers by unilateral action, improperly placed such added burdens on the salesmen in violation of the statute."

The idea that an arbitration award meriting deference must have considered and resolved statutory as well as contractual issues was elaborated in the Board's decision in Raytheon Co., 140 N.L.R.B. 883 (1963), enforcement denied on other grounds, 326 F.2d 471 (1st Cir. 1964). In *Raytheon*, a case involving alleged discrimination in violation of sections 8(a)(1) and 8(a)(3) of the NLRA, the Board implicitly added a fourth criterion to the three set forth in *Spielberg*: it refused to defer to an arbitration award where "the arbitrator did not, and was advised that he could not, even consider evidence that protected concerted and union activities were possible causes for the discharges" that had been the subject of the arbitration. Id. at 886. The *Raytheon* rule was extended in Airco Industrial Gases, 195 N.L.R.B. 676 (1972), to cases in which the arbitration award simply "gives no indication that the arbitrator ruled on the unfair labor practice issue," id. at 677, even if the award contained no express indication that the arbitrator had not considered the statutory issue. The Board went a step further in Yourga Trucking, Inc., 197 N.L.R.B. 928 (1972), holding that the party seeking deference to an arbitrator's award bore the burden of "adduc[ing] proof regarding the scope of matters presented in the arbitration proceeding." Id.

Two years later, the Board reversed itself in Electronic Reproduction Service Corp., 213 N.L.R.B. 758 (1974). Expressly overruling *Airco* and *Yourga*, the Board asserted that henceforth it would assume that an award resolved statutory as well as contractual issues "except where unusual circumstances are shown which demonstrate that there were bona fide reasons, other than a mere desire on the part of one party to try the same set of facts before two forums, which caused the failure to introduce such evidence at the arbitration proceeding." Id. at 762 (footnote omitted). In Stephenson v. NLRB, 550 F.2d 535, 539 (9th Cir. 1977), a panel of the Ninth Circuit, while acknowledging the Board's "laudable" goal, characterized *Electronic Reproduction Service* as "an unjustifiable extension of its deferral policy." *Stephenson* adopted instead the position taken by the District of Columbia Circuit Court in Banyard v. NLRB, 505 F.2d 342, 348 (D.C. Cir. 1974), adhering to the requirement that the arbitrator have "clearly decided the issue on which it is later urged that the Board should give deference."

Acknowledging the criticism in *Stephenson* and similar decisions, the Board reversed itself once again in Suburban Motor Freight, Inc., 247 N.L.R.B. No. 2, 103 L.R.R.M. 1113 (Jan. 8, 1980), overruling *Electronic Reproduction Service* and returning to the standards set forth in *Airco* and *Yourga*. The Board announced that "we will no longer honor the results of an arbitration proceeding under *Spielberg* unless the unfair labor practice issue before the Board was both presented to and considered by the arbitrator." 103 L.R.R.M. at 1114. We assume that *Suburban Motor Freight* validly and accurately describes the Board's current view on this question and is applicable here.

III. *Application of Deference Criteria*

Against this background we turn now to the manner in which the Board applied its deference criteria. As already indicated, the union argues that the arbitrator did not "address" the unfair labor practice issues and therefore the Board properly refused to defer to the arbitration award. It is true that the arbitrator did not, in so many words, find that the companies had not refused to bargain over a unilateral change in working conditions, in violation of sections 8(a)(1) and 8(a)(5). Instead he found, as a matter of contract interpretation and in the light of an examination of past practice, that the companies' institution of new procedures after November 1, 1975, did not impose a change in rules. This determination, however, was necessarily dispositive of the statutory issue: if no change in working conditions was imposed, no duty to bargain arose, and no unfair labor practice could have been committed. Because both the contractual and statutory issues rest on the same factual determinations, the arbitrator's better position and expertise as a factfinder strengthen the case for deference to his findings. Cf. Stephenson v. NLRB, supra, 550 F.2d at 538 n.4 (9th Cir. 1977). Under these circumstances, to insist here that the arbitrator announce that his resolution of the contractual dispute is intended as a resolution of the statutory issue as well as to impose a purely formalistic requirement. Thus, we conclude that the Board's "clearly decided" criterion was met in substance in this case.

In addition, this case presents what might be regarded as a congruence of interests, in that the union's claim primarily involves an asserted right affecting the union as a whole—a "group right" to certain working conditions. It is thus not a case in which an arbitrator's award affects rights of individuals or groups not directly party to the arbitration—as, for example, when a dispute arising out of an allegedly discriminatory discharge of an individual employee is brought to arbitration. See, e.g, Banyard v.

NLRB, supra; cf. Alexander v. Gardner-Denver Co., 425 U.S. 36 (1974) (rejecting a policy of deference to arbitration awards implicating individual statutory rights under Title VII of the Civil Rights Act).

The *Spielberg* criteria for deference would still not be satisfied if the result reached by the arbitrator were found to be "clearly repugnant" to the Act. In this case, however, the Board made no such determination. Indeed, as indicated earlier, see page 4310 supra, the Board's Regional Director specifically found that the award was not clearly repugnant to the Act's policies or purposes, and the Board offered no persuasive justification for setting this finding aside. The Board's only rationale for declining to defer was the assertion that the arbitrator had ruled in favor of the companies "because the contract between the parties contained no provisions pertaining to the matters at issue herein, and that it precluded consideration of past practices relating to the matter." It is on this basis, therefore, that the Board's decision must be reviewed. And on this basis, we believe the decision constitutes an abuse of discretion. The Board's rationale is simply incorrect; as the excerpts from the arbitrator's decision set out above indicate, the arbitrator plainly did consider past practice relating to C.O.D. collections, concluding that the companies had not departed from past practice. The arbitrator carefully presented the evidence on which he relied in reaching this conclusion, and while there was undoubtedly evidence to the contrary as well, the underlying questions were primarily factual issues that the arbitrator was best situated to resolve. His decision, moreover, was not "clearly repugnant" to the Act, as the Board's Regional Director found in his initial decision to defer. In short, the Board in this case declined to defer to an arbitrator's award that satisfied all of the criteria the Board has set, on grounds that do not withstand even casual scrutiny.

We do not doubt that the Board has wide discretion in defining the circumstances under which it will defer to an arbitration award, or indeed in determining whether it will defer under any circumstances. The Board is not required by statute to defer; as we have had occasion to note before, "the Board's rules on deference, after all, are self-imposed although it has followed healthy hints from the Supreme Court." NLRB v. Horn & Hardart Co., supra, 439 F.2d at 679. Once the Board has announced a particular set of rules, however, some constraints necessarily arise to limit its discretion in individual cases.[3] The Board cannot lightly change the rules on a case by case basis. As we said in *Horn & Hardart*,

> We do not suggest that the Board can announce a policy regarding deference to arbitration and then blithely ignore it, thereby leading astray litigants who depended upon it. But it can change its mind or alter its standards for deference in some respects without necessarily engaging in conduct so blameworthy as to justify our calling it abuse of discretion.

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[3] We are aware of the sharp differences of view expressed on this point in the opinions of Judges Rosenn and Garth in NLRB v. Pincus Brothers, Inc.-Maxwell, supra, with Judge Garth arguing that the Board is bound by *Spielberg* as a matter of law, and its decisions in individual cases thus reviewable under a standard of legal error. See 620 F.2d at 378-81. Judge Rosenn's view that individual determinations also remain subject to an abuse-of-discretion standard of review appears to have prevailed, however, in the Third Circuit. See NLRB v. General Warehouse Corp., 643 F.2d 965, 970 (3d Cir. 1981).

In this circuit, we have consistently reviewed individual deference decisions for abuse of discretion rather than legal error. See, e.g., NLRB v. Horn & Hardart Co., supra, 439 F.2d at 679. Cf. Lodges 700, 743, 1746, International Association of Machinists v. NLRB, 525 F.2d 237, 246 (2d Cir. 1975), and Nabisco, Inc. v. NLRB, 479 F.2d 770, 773 (2d Cir. 1973), both concerning decisions to defer to arbitration proceedings under the policy set in Collyer Insulated Wire, 192 N.L.R.B. 837 (1971).

Id. See also Roadway Express, Inc. v. NLRB, —— F.2d ——, ——, 107 L.R.R.M. 2155, —— (text accompanying notes 4-7) (4th Cir. Apr. 24, 1981); Hawaiian Hauling Service, Ltd. v. NLRB, 545 F.2d 674, 676 (9th Cir. 1976), cert. denied, 431 U.S. 965 (1977).

We want it to be clear that we hold no special brief for the conduct of the companies in this case, and we express no approval of their failure promptly to inform the salesmen's union of the changes being made in the 1975 drivers' contract or the companies' dilatory resistance to the union's initial request for arbitration. We are similarly unimpressed with the union's actions, since there is little room for doubt that before it finally accepted the 1975 contract, the union was aware of what had occurred in the companies' bargaining with the drivers; moreover, the union itself sought arbitration and then refused to abide by the result. In addition, it may be that reasonable persons will differ on whether the arbitrator reached the correct result. But all these concerns are secondary: the issue before us is whether we should enforce the Board's order.

In this case, the Board did not purport to clarify or revise its announced standards for deference. Strictly speaking, it did not even decide whether the circumstances presented here warranted an exercise of its discretion in deferring to the arbitrator's award. Instead, acting on a motion for summary judgment, it misconstrued the arbitrator's award and, relying exclusively on its misconstruction, "blithely ignored" its own standards.[4]

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[4] Although we do not reach the merits of the Board's reasoning, we note that the Board expressly rejected the ALJ's finding that the companies had "directly pressured the salesmen to collect C.O.D. payments," and relied instead on its decision in Yellow Cab Co., 229 N.L.R.B. 1329 (1977), for the conclusion that "where an employer knowingly utilizes the force of circumstances to control the conduct of its employees, the failure to control them with direct orders may become legally insignificant." The Board's order in *Yellow Cab*, however, was denied enforcement by the District of Columbia

To accept its action in this case would render the Board's —and the courts'—laboriously developed standards of deference virtually meaningless, depriving parties to collective bargaining agreements of a reasonable expectation of finality in properly conducted arbitrations and significantly undermining the value and efficacy of arbitration as an alternative to the judicial or administrative resolution of labor disputes.

Although these considerations alone provide ample support for our decision not to enforce the Board's order in this case, we must note in addition the difficulties posed by the nature of the order itself. As indicated earlier, the essential thrust of the order is that the companies bargain with Local 2 over the issue of C.O.D. collections. But as we also indicated earlier, the union and the companies did have an opportunity to bargain over the issue in the course of negotiating the agreements to replace the 1975 contracts when they expired in 1978. The parties were not able in those negotiations to devise rules on collections acceptable to both sides, so that, as we were informed at oral argument, the practice under the 1978 contracts has remained essentially the same as under the 1975 contracts. Thus, the Board would now, in effect, give to the union the most it could possibly have hoped to obtain in bargaining—a return to the old system of collection or its compensatory equivalent—as an interim measure, while ordering bargaining that has in fact already occurred, although not with results desired by the union. We think that such an order, in so stale a dispute originally caused by the exigencies of simultaneous bargaining with two unions almost six years ago, has a distinct air of unreality about it, and we are left with the conviction that its enforcement would not serve the ends of justice or the purposes of national labor law.

Circuit Court, see Local 777, Democratic Union Organizing Committee v. NLRB, 603 F.2d 862, 872-81 (D.C. Cir. 1978). The Board's cursory analysis of this point thus seems nearly as questionable as its construction of the arbitrator's award.

IV. *The Union's Petition*

We turn finally to the union's petition for review of the Board's order insofar as the Board did not act on its request for attorneys' fees as part of the remedy sought. We see no merit in the union's argument that the companies have engaged in frivolous litigation, and we similarly see no basis for concluding that the Board abused its discretion in this connection. The petition is accordingly denied.

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 29th day of July one thousand nine hundred and eighty-one.

Present:

Hon. Wilfred Feinberg, Chief Judge
Hon. Sterry R. Waterman, Circuit Judge
Hon. Ellsworth A. Van Graafeiland,
Circuit Judge

Liquor Salesmen's Union Local 2 of the State of New York, Distillery, Rectifying, Wine & Allied Workers' International Union, AFL-CIO,

Petitioner,

v.

National Labor Relations Board,

Respondent.

Charmer Industries, Inc., Star Industries, Inc., Standard Wine & Liquor Co., Inc., Peerless Importers Inc., and National Distillers Distributing Co.,

Petitioners,

v.

National Labor Relations Board,

Respondent.

PARK & TILFORD & MOTEL & CLUB, DIVISIONS OF
KNICKERBOCKER LIQUORS CORP.,
Petitioners,
v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,
and

LIQUOR SALESMEN'S UNION LOCAL 2,
Intervenor.

Petition for review and cross-applications for enforcement of an order of the National Labor Relations Board,

This cause came to be heard on a certified list of items comprising the record of the National Labor Relations Board and was argued by counsel.

Upon consideration thereof, it is hereby ordered, adjudged and decreed that the petitions for review are granted and the cross-applications for enforcement denied in accordance with the opinion of this court with costs to be taxed against the respondent.

A. DANIEL FUSARO
Clerk

by /s/ Arthur Heller
ARTHUR HELLER
Deputy Clerk

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fifth day of October, one thousand nine hundred and eighty-one.

No. 80-4264

LIQUOR SALESMEN'S UNION LOCAL 2 OF THE STATE OF NEW YORK, DISTILLERY, RECTIFYING, WINE & ALLIED WORKERS' INTERNATIONAL UNION, AFL-CIO,
Petitioner,
v.
NATIONAL LABOR RELATIONS BOARD,
Respondent.

CHARMER INDUSTRIES, INC., STAR INDUSTRIES, INC., STANDARD WINE & LIQUOR CO., INC., PEERLESS IMPORTERS INC., and NATIONAL DISTILLERS DISTRIBUTING CO.,
Petitioners,
v.
NATIONAL LABOR RELATIONS BOARD,
Respondent.

PARK & TILFORD & MOTEL & CLUB, DIVISIONS OF KNICKERBOCKER LIQUORS CORP.,
Petitioners,
v.
NATIONAL LABOR RELATIONS BOARD,
Respondent,
and
LIQUOR SALESMEN'S UNION LOCAL 2,
Intervenor.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the intervenor, Liquor Salesmen's Local Union 2,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ A. Daniel Fusaro
A. DANIEL FUSARO
Clerk

by /s/ Francis X. Gindlisit
Chief Deputy Clerk

250 NLRB No. 31

D-6541
Astoria, Long Island City,
Syosset, Woodside,
and Brooklyn, NY

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case 29-CA-4885

CHARMER INDUSTRIES, INC.

Case 29-CA-4887

PARK & TILFORD & MOTEL & CLUB
DIVISIONS OF KNICKERBOCKER LIQUOR CORP.

Case 29-CA-4888

STAR INDUSTRIES, INC.

Case 29-CA-4889

STANDARD WINE & LIQUOR CO., INC.

Case 29-CA-4890

PEERLESS IMPORTERS, INC.

Case 29-CA-4891

NATIONAL DISTILLERS DISTRIBUTING CO.

and

LIQUOR SALESMEN'S UNION, LOCAL 2 OF THE STATE OF NEW YORK, DISTILLERY, RECTIFYING, WINE & ALLIED WORKERS' INTERNATIONAL UNION, AFL-CIO

DECISION AND ORDER

On September 21, 1979, Administrative Law Judge Jennie M. Sarrica issued the attached Decision in this proceeding. Thereafter, Respondents and the Charging Party filed exceptions, supporting briefs, and reply briefs. Respondents filed joint briefs, with the exception of Respondent Knickerbocker Liquor Corporation, which filed only its own exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge, as modified herein, and to adopt her recommended Order, as modified herein.

Respondents are liquor wholesalers operating in New York City. Each has a separate but identical contract with the Charging Party covering its liquor salesmen. In November 1975, Respondents unilaterally promulgated new procedures for collecting payments from their c.o.d. customers. Because these procedures resulted in substantial additional duties and burdens for Respondents' salesmen and were not a matter of manageemnt prerogative, we agree with the Administrative Law Judge, for the reasons noted below, that the unilateral promulgation of these procedures violated Section 8(a)(5) and (1) of the Act.

New York State law requires that commercial customers of liquor wholesalers pay for shipments of liquor on or before receipt if these customers have become delinquent in their payment for sales made on credit. These customers then become c.o.d. customers. Prior to November 1975, Respondents' truckdrivers were required to collect payments from c.o.d. customers when they made deliveries. This procedure resulted in orders normally being delivered the day after they were placed. In November 1975, Respondents agreed during contract negotiations with the truckdrivers that the drivers would no longer be responsible for this collection. Respondents then unilaterally promulgated new collection procedures under which payments could either be collected directly by salesmen, mailed in by the customers, or customers could repay orders by mailing in blank checks.[1] While direct collection by salesmen under these procedures normally resulted in orders being delivered the next day, mailing by customers entailed a delay of at least 1 day, and sometimes 3 or 4 days. Since c.o.d. customers operated with a small cash flow, many of them requested that salesmen collect their payments personally to avoid the delay involved in mailing. Although this collection involved added time, expenses, and physical danger,[2] salesmen testified that they complied with customers' requests in order to avoid losing orders. Thus, if one salesman did not provide the service a customer required, that customer might find another salesman who would.

In light of the above, we find that Respondents' unilateral promulgation of their new c.o.d. collection procedures violated Section 8(a)(5) and (1) of the Act. While the procedures established ostensibly provided for alternatives to direct collection by salesmen, the inadequacy of the alternatives available exposed the salesmen to considerable economic pressures which forced them to begin collecting payments themselves. We cannot conclude that Respondents were ignorant of these pressures. For example, the credit manager for Respondent Standard Wine & Liquor testified that Standard's purpose in developing its collection procedures was to enable its salesmen to "maintain their living" in face of the truck-drivers' change in duties, a clear admission of the awareness of the economic consequences for the salesmen of inadequate collection procedures. Neither can we conclude that Respondents were indifferent to their salesmen's response to these pressures. The wholesale liquor industry is highly competitive. If one of Respondents' salesmen loses sales to a salesman of another employer, he loses commissions—but Respondents also lose profits. Thus, a salesman for Respondent Star Industries testified that salesmen are urged at each sales meeting to "service" every account. Salesmen are pressured to relinquish customers if they regularly fail to sell to them. Quotas for sales are established. Although Respondents argue that they never ordered their salesmen to collect c.o.d payments and that the salesmen were free not to do so, we note that Respondents' procedures for personal collection by salesmen were elaborate, and that eventually a computerized system was developed to facilitate them. We thus cannot presume that Respondents, in promulgating their procedures, ever intended to stand by and passively suffer the loss of sales that would occur if the salesmen failed to heed customers' requests.[3]

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[1] Since many c.o.d. customers were required by Respondents to use certified checks, this last option was frequently not available.

[2] Since customers often paid in cash, this subjected the salesmen to the danger of robberies. In fact, since November 1975, several salesmen were attacked and some began to carry guns.

Respondents' unilateral change in its c.o.d. collection procedures also had a substantial impact on the salesmens' working conditions. The change altered the salesmens' duties, and subjected them to the physical dangers of carrying large sums of cash. Furthermore, the change was a result, although a necessary result, of the alteration of the job duties of Respondents' drivers. It was not the result of altered fiscal policies nor did it involve the investment of capital. To require Respondents to bargain over the change would involve no more than bargaining over wages, hours, and working conditions, and would not require bargaining over an exclusively managerial decision.[4] In sum, we find that Respondents were under a duty to bargain about that change with the Charging Party and violated Section 8(a)(1) and (5) of the Act[5] by failing to do so.[6]

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[3] In this regard then, we do not adopt the Administrative Law Judge's conclusion that Respondents directly pressured the salesmen to collect c.o.d. payments, see fn. 5, *infra*, but we note that where an employer knowingly utilizes the force of circumstances to control the conduct of its employees, the failure to control them with direct orders may become legally insignificant. *Yellow Cab Company*, 229 NLRB 1329 (1977).

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondents, Charmer Industries, Inc., Astoria, New York; Park & Tilford & Motel & Club

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[4] *International Harvester Company*, 236 NLRB 712, 713 (1978).

[5] We do correct the Administrative Law Judge's erroneous finding that, prior to November 1975, salesmen never collected payments from c.o.d. customers, as well as the finding that, after November 1975, Respondents sometimes pressured salesmen into collecting payments from certain c.o.d. customers by withholding delivery of all of their other orders. Rather, the record shows that, prior to November 1975, salesmen did sometimes, although rarely (and hence not as an established practice) collect c.o.d. payments, and that, after November 1975, Respondents sometimes withheld delivery on salesmen's *remaining* c.o.d. orders when they had delayed in bringing in payments collected from other customers. These corrections do not affect our conclusion that a violation of Sec. 8(a)(5) has been established here.

Furthermore, with respect to the argument that the Union waived its right to contest Respondents' actions, we find that the Union did request bargaining over the new procedures and did not waive its bargaining rights. *Century Electric Motor Company*, 180 NLRB 1051, 1054 (1970).

[6] We revise the Administrative Law Judge's recommended Order to require the rescission of any disciplinary actions against salesmen which may have occurred due to the failure to collect personally payments from c.o.d. customers.

Divisions of Knickerbocker Liquor Corporation, Syosset, New York; Star Industries, Inc., Syosset, New York; Standard Wine & Liquor Co., Inc., Woodside, New York; Peerless Importers, Inc., Brooklyn, New York; and National Distillers Distributing Company, Long Island City, New York, their officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 2(b):

"(b) Make whole the employees in the said appropriate unit for any loss of time and any added expenses incurred as a result of the unilateral changes in working conditions of salesmen, with interest thereon in the manner prescribed in the section of the Administrative Law Judge's Decision entitled 'The Remedy,' and rescind any disciplinary actions which occurred because salesmen may have lost commissions or accounts due to their failure to collect personally payments from c.o.d. customers."

2. Substitute the attached notice for that of the Administrative Law Judge.

Dated, Washington, D.C. June 30, 1980

John H. Fanning, Chairman

Howard Jenkins, Jr., Member

John C. Truesdale, Member

NATIONAL LABOR RELATIONS BOARD

[SEAL]

JD-680-79
Astoria, Syossett, Long Island,
Brooklyn and New York, NY

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

Case 29-CA-4885

CHARMER INDUSTRIES, INC.

Case 29-CA-4887

PARK & TILFORD & MOTEL & CLUB
DIVISIONS OF KNICKERBOCKER LIQUOR CORP.

Case 29-CA-4888

STAR INDUSTRIES, INC.

Case 29-CA-4889

STANDARD WINE & LIQUOR CO., INC.

Case 29-CA-4890

PEERLESS IMPORTERS, INC.

Case 29-CA-4891

NATIONAL DISTILLERS DISTRIBUTING CO.

and

LIQUOR SALESMEN'S UNION, LOCAL 2 OF THE STATE OF NEW YORK, DISTILLERY, RECTIFYING, WINE & ALLIED WORKERS' INTERNATIONAL UNION, AFL-CIO

G. Peter Clark, Esq., of Brooklyn,
NY, for the General Counsel.

Morton Schimmel, Esq., of New York,
NY, for Respondents (*Charmer, Peerless, Star and Standard Wines*),[1]

James Dean, Esq. (*Putney, Twombly, Hall & Hirson*), of New York, NY,
for Respondent Knickerbocker.[2]

Victor Feingold, Esq., of New York,
NY, for the Charging Party.

DECISION

Statement of the Case

JENNIE M. SARRICA, Administrative Law Judge: This is a proceeding under Section 10(b) of the National Labor Relations Act, as amended, (29 U.S.C. 151, *et seq.*), hereinafter referred to as the Act. Based on charges filed on March 1, 1976, a consolidated Complaint and Notice of Hearing issued on August 31, 1977, alleging that Charmer Industries, Inc., (Charmer); Park & Tilford & Motel & Club Divisions of Knickerbocker Liquor Corp., (Knickerbocker); Star Industries, Inc., (Star); Standard Wines & Liquor Co., Inc., (Standard); Peerless Importers, Inc., (Peerless); and National Distillers Distributing Co., (National), hereinafter referred to collectively as Respondents, or individually by name indicated in parenthesis above, committed unfair labor practices within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

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[1] No appearance was entered at the hearing on behalf of National Distillers Distributing Co. However, the Answer for the group of Respondents included National by name, and later attempts on the record to enter into a stipulation regarding the successorship of Standard to the operations of National, together with other testimony of record, indicates that National Distillers Distributing Co. no longer exists as a separate entity but has operated as National Wine and Spirit Division of Standard since April, 1976.

[2] This Respondent rested entirely on the separate Answer to the Complaint filed on its behalf and did not participate in the hearing herein.

Upon due notice, the case was tried before me at Brooklyn, New York, on March 13, 14, 15 and 16, 1978. Representatives of all parties, except National and Knickerbocker, entered appearances and had an opportunity to participate in the hearing.

On October 11, 1977, the Respondents filed with the Board a motion for Summary Judgment based on a favorable arbitration award. The motion was denied by the Board on November 14, 1977 on the ground that the award did not dispose of the unfair labor practice allegations of the Complaint. A request for reconsideration filed on November 21, 1977 was denied by the Board on December 29, 1977. At the hearing herein Respondents again urged before the undersigned, as an affirmative defense to this proceeding, the same grounds advanced in its motion for Summary Judgment before the Board, arguing that under the Federal Rules of Civil Procedure "denial of a motion for Summary Judgment is interlocutory and not *res judicata.* Testimony in support of this affirmative defense was rejected by the undersigned at the hearing on the ground that the Board's determination of this issue in considering the motion of Respondents for Summary Judgment was binding on the Administrative Law Judge as the law of the case. In their brief to the undersigned, Respondents again urged deferral to the decision of the arbitrator under *Spielberg Manufacturing Company*, 112 NLRB 1080. This argument is again rejected on the same aforesaid basis.

As a further affirmative defense, Respondent urged at the hearing dismissal of the Complaint as time-barred under Section 10(b). Respondent based this defense on the argument that the change itself came about through collective bargaining with respect to the duties of drivers and helpers represented in another suit, and since neither the Charges nor the Complaint issued herein alleged as the unlawful conduct failure to bargain about the effects of the change upon the working conditions of the Salesmen, as distinguished from failure to bargain about the change itself, there is a variance between the allegations and the proof which requires dismissal of the proceeding.

It is asserted in the Charge herein that "the employer *unilaterally changed the work rules of the salesmen-employees* represented by the Union, without notice, and persists in enforcing said change . . ." (underscoring supplied). This clearly identifies the change referred to as the *working conditions of Salesmen.* The Complaint alleges in sections numbered 17 and 18, violations of Section 8(a)(1) and (5) by reason of the *acts* set forth in sections numbered 13, 14, 15 and 16, thereof, and "by each said act." Section 13 recites that the collective-bargaining agreement between Respondents and Local 816 effective November 1, 1975, contained "a specific provision discontinuing the prior practice . . . and . . . a provision prohibiting the aforesaid delivery drivers from picking up any 'C.O.D. Account' checks when they make deliveries to customers of the Respondents." Sections 14 through 16 of the Complaint read as follows:

> 14. On or about November 2, 1975 Respondents advised their liquor salesmen in the units, that pursuant to the contract provision with Local 816, that the delivery drivers would no longer pick up checks from 'C.O.D. Accounts.'
>
> 15. (a) On or about November 2, 1975 Respondents further informed their liquor salesmen that prior to their being able to schedule delivery to their 'C.O.D. Accounts', salesmen would have had received a check or cash covering the amount due on the aforesaid 'C.O.D. Accounts.'

(b) On or about November 2, 1975 Respondents placed into effect the procedure described above in paragraph a.

16. Respondents, and each of them, changed their 'C.O.D. Accounts' collection procedure, and placed a new procedure into effect as described above . . . thereby unilaterally changing terms and conditions of employment, without prior notice to the Union, and without having afforded it an opportunity to negotiate and bargain with the Respondents concerning such change.

Considered as a whole, these sections of the Complaint spell out an allegation that the newly-instituted 'C.O.D. Accounts" collection procedures constituted a unilateral change in the terms and conditions of employment of Salesmen which required prior notice to Local 2, and an opportunity to negotiate with respect thereto. I do not perceive in the effort to establish the change with respect to the working conditions of Salesmen by evidence of the effect upon their working conditions brought about by Respondents' method of implementing a change in the duties of delivery drivers as they related to collection procedures, such a variance from the allegation of the Charge and the Complaint as to warrant application of the time restriction of Section 10(b) of the Act, and, accordingly, I hereby reaffirm my ruling to allow evidence of "effect" for the purpose of establishing the existence of a change with respect to Salesmen.[3]

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[3] *Hunter Saw Division of Asko, Inc.*, 202 NLRB 330, cited by Respondents involved separate acts which would be independent violations, i.e., unlawful failure to recall as differentiated from an unlawful layoff. I find it distinguishable from the instant case on this ground. *Tube-Lok Products*, 209 NLRB 666, also cited by Respondents, is inapposite as it involved (at p. 668) a lack of notice regarding yet another incident supporting an 8(a)(5) allegation based on conduct of the attorney, which injected complications into the proceeding because it gave rise to application

Based on the entire record, including by observation of the witnesses, and after due consideration of briefs and arguments, I make the following:

Findings and Conclusions

I. Jurisdiction

It is alleged in the Complaint, admitted in the Answer, and I find, that Respondents are, and have been at all times material herein, corporations duly organized under, and existing by virtue of the laws of the State of New York; that at all times material herein, the Respondents have each maintained their principal offices and places of business at the addresses listed opposite their respective names in Section 3 of the Complaint where each of them has been engaged in the wholesale sale and distribution of alcoholic beverages and related products; that during the past year, a representative period for their annual operations, in the course and conduct of their businesses, each purchased and caused to be transported and delivered to their individual places of business in the State of New York, liquors, alcoholic beverages and related products, and other goods and materials valued in excess of $50,000, of which goods and materials valued in excess of $50,000 were transported and delivered to each of their places of business in interstate commerce directly from states of the United States other than the State of New York and in foreign commerce directly from foreign countries; and that Respondents are, and each of them has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

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of the Canon of Legal Ethics on a matter viewed by the Administrative Law Judge as "trivia", of "dubious merit" and which "add[ed] nothing to the case."

II. The Labor Organizations

It is alleged in the Complaint, admitted in the Answer, and I find, that the Charging Party, Liquor Salesmen's Union, Local 2, of the State of New York, Distillery, Rectifying, Wine & Allied Workers' International Union, AFL-CIO, hereinafter referred to as Local 2, or as the Union; and Local 816, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called Local 816, are, and each has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. The Units

It is alleged in the Complaint, admitted in the Answer, and I find, that Local 2 is the collective-bargaining representative of separate units appropriate under Section 9 of the Act consisting of the following employees of each of the Respondents:

> All licensed liquor salesmen, excluding all truck drivers, office clerical employees, all other employees, guards and all supervisors as defined in Section 2 (11) of the Act.

IV. The Alleged Unfair Labor Practices

A. *The Issues*

1. Whether there was a change in terms and conditions of employment of Salesmen which was unilateral and violative of Section 8(a)(5) and (1) of the Act.

(a) Whether the change, from collection by drivers of payment by C.O.D. customers on delivery of merchandise to prepayment by means of collection by Salesmen before delivery, constituted a change in the working conditions of Salesmen?

(b) Whether the timing of the change with respect to the termination date of the collective-bargaining agreement covering Salesmen freed Respondents to take unilateral action.

(c) Whether the Union waived bargaining by failure to request bargaining as to the change or the effect?

(d) Whether this change was the exercise of a managerial right or a mandatory bargaining subject?

B. *Background*

Respondents are licensed wholesalers of alcoholic beverages in the Metropolitan New York City area. For many years their truck drivers and helpers have been represented by Local 816 while the licensed Salesmen have been represented by Local 2. The collective-bargaining agreements of each had an expiration date of October 31, 1975. For many years, a part of the duties of drivers and helpers was the collection of payment[4] for merchandise upon delivery to C.O.D. customers.[5]

Respondents are licensed, both by the U.S. Treasury Department and by the New York Liquor Authority under Alcoholic Beverage Control Laws and are required to file various reports to both the Federal and State governments. Similarly all of their customers must be licensed, whether they are package liquor stores, bars, restaurants, clubs, or caterers, etc. Wholesalers may extend credit but this is also controlled in that the payment due date is uniformly established according to the last digit of the customer's license number, and any delinquency must be reported to the State which then places the customer on the "delinquent account" list published regularly. No wholesaler may then extend credit to that account and these customers become what is known as "C.O.D. Accounts" to all wholesalers, at least as long as they are on the State "delinquent account" list. Credit managers of individual wholesalers may make more stringent credit determinations by placing ceilings on the amount of credit available from his company to any given customer or by determining not to extend credit at all to a customer not appearing on the State list. "C.O.D. Accounts" are of two classifications: those whose business check is honored and those whose check will not be accepted and who must, therefore, pay by certified check, money order or cash.

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[4] In 1964, by a provision in the collective-bargaining agreement of Local 816, drivers and helpers were no longer required to accept "hard" or "cold" cash and those customers who could not pay by an acceptable business check were required to supply certified checks or money orders in order to receive the merchandise.

[5] As a general reference this includes all but credit customers.

Before November 1, 1975, drivers and helpers collected for merchandise on delivery to "C.O.D. Accounts" as part of their regularly assigned job duties. This was particularly covered in the then effective Local 816 contract. During that period Salesmen[6] had no assigned duties related to Respondents' collection procedures, but merely turned in for processing and routine delivery the orders of all customers whether sold on a credit or a C.O.D. basis. Such orders were normally delivered the following day.

C. *The Pertinent Events*

Early during negotiations between Respondents and Local 816 for a contract to succeed the agreement expiring on October 31, 1975, Local 816 proposed elimination of the collection duties of its drivers and helpers. Their November 1, 1975 contract did eliminate that function. During the same period Respondents were in negotiations with Local 2 for a contract to succeed their collective-bargaining agreement covering Salesmen which was likewise expiring on October 31. At no time during negotiations was the possibility of a change in collection procedures brought up by Respondents or discussed with Local 2 representatives. The last negotiation meeting between Respondents and Local 2, before their contract expiration date, was held on October 29, 1975. On Saturday, November 1, at a meeting of Local 2, its President presented to the members for a vote the last offers of Respondents which were rejected and a vote empowering the officers of Local 2 to call a strike, at their discretion and without further authority, was given. This vote came to the attention of the General President of the Local 2's International Union who arranged an emergency meeting with Respondents for Sunday, November 2, to avoid a strike by Salesmen. Agreement was reached at that meeting[7] and no strike materialized on Monday, November 3, the next working day.

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[6] The Salesmen are paid a guaranteed draw of $175 a week against commissions; they receive a car allowance and a general expense allowance and do not have to account for these to their employer. Additionally, they have certain fringe benefits such as holidays, vacations, life insurance, health and welfare and pension plans. They are entitled to commissions on orders from their customers placed directly with the Company and do not have to account for their time and activity except for attendance at sales' meetings, the regular servicing of the accounts assigned them, and the requirement that they endeavor to meet the production goals set for them by the Sales Supervisor.

In the meantime, as indicated above, Respondents and Local 816 settled their differences and reached agreement on November 1, 1975. The testimony indicates that agreement on the provision requiring a change in the collection procedures was reached in the final hour.

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[7] The handwritten memorandum signed at the November 2 meeting was specifically made subject to the approval of the Respondents. A letter dated November 3, 1975 by Respondents' chief negotiator memorialized the approval by the wholesalers and set forth the substance of the agreement reached. Certain verbal assurances on funding of the changes in the pension and welfare plans covered by the agreement were confirmed in writing to Respondents by Local 2's actuarial consultant on November 5, 1975, and were approved by Respondents on November 6, followed by certain mathematical corrections thereof made by Respondents' chief negotiator on November 12, 1975.

Peerless' officials met on the morning of November 3 and issued a handwritten directive, effective immediately, on "C.O.D. Accounts" stating that these "must be prepaid"; that "customers will be phoned" at the end of the day as to the amount of the invoice; and "customer can mail check . . . or can be picked [sic] by salesmen and brought to the office," after which "order will be shipped." This directive was distributed to Salesmen of Peerless.[8] That afternoon Salesmen of Peerless called the office to make inquiries because C.O.D. customers complained of not receiving deliveries of merchandise ordered. On or about November 5, after receiving this directive, several Salesmen called Local 2 to complain about the added duties and complications in their work caused by Respondents' new credit procedures. Around this time Respondents obtained from Local 816 a 1-week reprieve on effectuating the 816 contract change of noncollection by drivers.

On the evening of November 7, 1975, when Local 2 met to ratify the new contract, its President received complaints from some Salesmen about being required to pick up payments from customers for C.O.D. Orders. He announced from the platform that such a requirement was contrary to their collective-bargaining agreement and that Salesmen did not have to perform such duties. The following week Salesmen from Star and Charmer received written directives dated November 7.[9]

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[8] Each Respondent maintains a message center where Salesmen can call to obtain any messages or report in person and pick up messages and written communications. Directives and other pertinent material for Salesmen are distributed in this fashion or are mailed to their respective homes.

[9] The one from Star, signed by the Credit Manager, was directed to "All Salesmen" and stated it was pursuant to the new contract with Local 816, and the State requirement for prepayment. It set forth a procedure whereby the invoices of all C.O.D. orders placed before noon would be calculated by 1:30 p.m. and stated, "These totals will be available to you should you call in . . . . After

This was followed on November 12 by an extensive memorandum by Peerless designed to "clarify the confusing situation." It set forth in detail the collection procedures applicable for prepayment of C.O.D. orders. After reciting the options given customers of mailing a check which would create a 3-day delay in delivery or leaving with the wholesaler, in advance, signed blank checks which would save one and possibly 2 days of the delay in delivery, the directive provided:

> We will also ship orders where the customer gives our salesman a check for the exact amount of the invoice. In this case the salesman must have the check in his possession, call us and give us the check number and the amount of the check. The order will then be shipped the following day. It will be the responsibility of the salesman to see that the check is in our possession no later than 10 a.m. of the day following delivery.
>
> Any salesman who avails himself of this method is hereby notified that failure to have any check in our possession by the prescribed time could result in the withdrawal of this option for the salesman involved.

The other Respondents instituted substantially the same method of collection procedures as a replacement for the duties previously performed by their drivers. Their sales-

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notification, invoices will be held . . . . pending receipt of certified check or money order. At that time orders will be released for next-day delivery. In the event we are unsuccessful in making customer contact, a message will be left for you for your further handling." The Charmer notice, likewise addressed to "All Salesmen" labeled the subject "New C.O.D. Procedures," indicated, "Salespersons . . . calling in C.O.D. orders for following day delivery, must call in order before 12 noon . . . Call message center. Amount will be given between hours of 2:30 p.m. no later than 5 p.m. Salespersons will pick up check. Call . . . that they have payment . . . Payment must be submitted to Credit Dept. anytime the following day, after approval.

men were initially apprised of this verbally, through the message arrangement, or at sales' meetings.

On November 12, having received official documentation of the change, Local 2 sent a letter to Respondents' chief negotiator protesting that Respondents had "unilaterally and without notice" changed the working conditions of salesmen by instructing them "to pick up payment in advance from all customers who are on a Cash or C.O.D. basis." Respondents' chief negotiator and representative replied on November 13, asserting that the change was brought about through collective bargaining with Local 816 [10] and to avoid a strike by that union, and that Local 2 had notice of this change because "it was subject of discussion" at the November 7, Local 2 meeting held to ratify the contract.

Variations in the detail of this changed collection procedure followed, including installing additional phones to receive taped orders and messages from salesmen; the establishment of a new department to facilitate supplying customer invoice totals to salesmen and to handle the release of orders for delivery received from salesmen; and finally a completely computerized program which would print out among other information, directions to a named salesman to "pick up the money" from the specified customer. Although the many directives carefully avoided specifically ordering Salesmen to assume the collection duty, and some used phrases designed to imply not only that such tasks were at the option of the Salesmen but also that the many facilities and procedures were being instituted to accommodate the Salesmen, as a whole the publications, clearly directed to Salesmen, left no doubt as to what was expected of them. Indeed, in some instances the wholesaler went so far as to threaten to hold delivery on all of a particular Salesman's orders until he collected and turned in the money on orders from certain of his C.O.D. Accounts. The computerized phrase for this was "you are now on hold."

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[10] The assertions in the November 13, 1975 letter constitute the first knowledge Local 2 had concerning a Local 816 contract change affecting collections. Although the Star memorandum dated November 7 mentioned the "effect of the new 816 contract," the indication is that Salesmen received this memo on or after Monday, November 10, and there is no evidence that the memo was presented to Local 2. I find that this memo to Salesmen did not constitute notice to the Union.

The new collection procedures adopted by Respondents brought about the following changes in the duties of Salesmen. Whereas before November 3, 1975, Salesmen treated all orders alike, calling them in to their employer for routine next-day delivery and having nothing whatsoever to do with the wholesaler's collection procedures and had no authority to release a shipment for delivery, now on all but credit accounts he must call in the customer's order; check back with the office at specified hours to obtain the total amount on the invoice; ascertain whether a regular business check will be accepted or a certified check or money order is required; contact the customer again, advising of the amount and the type of payment needed and ascertaining when he can pick up the money; go to the customer and obtain the payment;[11] call the office again to release the order for delivery after he has the money; and go to the office within a specified time to turn in the proceeds. This change in the duties of Salesmen is not only very time consuming compared to the single phone call to place the order previously required, but also places the

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[11] Frequently the customer required to have a certified check tenders instead "cold" or "hard" cash which then necessitates that the Salesman go to a bank to obtain a certified check or money order. This requires added time and cost. Respondents are fully aware of this circumstance and have arranged with specified banks for these services at no added cost to the Salesmen. However, those banks are not always open or conveniently nearby. To force Salesmen to convert cash, some Respondents have issued notice to their Salesmen that cash will not be accepted in their office.

Salesman in the dangerous position of being on the streets while handling substantial funds, and requires added expenses in phone calls and transportation, and bank fees, while placing him in the unwelcame position with his customers of being a collection agent.

These new collection procedures were not without effect upon the operations of Respondents. Thus, C.O.D. orders delivered prior to November 1, 1975, were frequently returned by the drivers because the customer did not have the required payment for the driver at the time of delivery, or the individuals who made such payments were not there when the truck arrived. These routinely were brought back to the warehouse and delivered again the next day, without any real assurance that delivery would be completed the next time. Indeed, it was not uncommon for customers to place orders with more than one wholesaler and to accept delivery from the first one who arrived, or from the one who arrived when the customer happened to be present and have payment available. In this event, if another wholesaler got his delivery there first, the order would be cancelled. Such a procedure was costly to Respondents and time consuming for its employees in the delivery, warehouse, invoicing and credit departments, because of the amount of unproductive work involved. With the Salesmen collecting the money in advance of shipment, a virtual end was put to the practice of duplicating orders and nothing went to the warehouse or delivery employees until payment was received by Respondents, or their collection agents—the Salesmen.

D. *Analysis and Conclusions*

Initially, I must observe that it is not the change in the duties of drivers with which we are here concerned. The only significance of that change in the Local 816 contract to this case is as background in establishing what the requirements of Salesmen were with respect to collections before the alleged change in their working conditions. I, therefore, reject Respondents' argument that the change referred to in the Charge and the Complaint was the one made in the contract with Local 816, after bargaining.

Respondents make some point of appearing as the unwilling victim of a Teamster strike threat. Their chief negotiator assumed that posture of being helpless to avoid this imposition and burden thrust upon Salesmen, claiming it to be a consequence of the change bargained for in the Local 816 contract, and misconstruing the change being protested by Local 2 as directed to the duties of delivery personnel rather than to the change of duties imposed upon Salesmen. To the extent that this is part and parcel of Respondents' argument that the change was caused by circumstances beyond their control, I reject such argument.[12] The concluding and execution of a collective-bargaining agreement with Local 816, together with its content cannot be said to fall within the category of "external influences," "outside agencies" or "external contingencies" which adversely affected the interests and "environment" of the Salesmen as argued by Respondents in their brief.[13]

When Respondents agreed with Local 816 to remove all collection of invoices on delivery from the responsibility of drivers, they were faced with the necessity of devising some method whereby they could comply with the State requirement of prepayment for merchandise by all licensees on the State delinquency list. The concomitant change instituted by Respondents in the duties, authority and responsibility of their Salesmen was their choice of affirmative resolution as to who would take over this responsibility. Requiring[14] Salesmen to perform this task was not the only alternative Respondents had and, therefore, was not merely "an effect" as argued by Respondents. Without knowing the intricacies of collection procedures, it occurs to me that Respondents could have employed collectors, or engaged a collection agency, to call upon each customer as the drivers had done upon receipt of an order and to perform the collection duties previously assigned to drivers and now performed by Salesmen. I do not suggest that this would be the best solution, but it demonstrates that the decision to require Salesmen to perform these duties was a deliberate one.

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[12] With respect to Respondents' claimed reluctance to capitulate to Local 816's contract demands in this respect, and without conceding that it would have any real bearing upon the issues herein, the evidence set forth above indicates that Respondents benefited as much as the drivers from this agreement, which casts serious doubt upon Respondents' claim that they acceded to Local 816's demands in the final hour to avoid a strike.

[13] *National Football League*, 203 NLRB 165 *Commarata v. Local 757*, U.S. District Court, Eastern District of New York, 96 LRRM 3298, 3300, cited by Respondents are inapposite.

Nor do I agree with Respondents that mention by Local 2's President, at the ratification meeting on November 7, of the complaints by a few of the Salesmen, constituted notice of the change Respondents were in the process of making unilaterally with respect to the duties of Salesmen, and that Local 2's failure to demand bargaining over any effect upon Salesmen of the Local 816 contract change; the subsequent ratification of the Local 2 contract; and the Salesmen's performance of the collection duties despite Local 2's advice that they did not have to do so, constitute a "waiver." and "relinquishing, and abandoning" of any claim of unfair labor practice. Indeed, there is no suggestion of proof against Local 2's denial thereof that it had any knowledge at that time of the change in Local 816's contract; and no evidence Local 2 had knowledge of Respondents' decision to impose such duties upon the Salesmen. When Local 2 became aware of the various memoranda and directives reflecting implementation of the change in the work of Salesmen, Local 2's President vigorously protested such unilateral action, alerting Respondents that it viewed such conduct as violative of the National Labor Relations Act and, thereafter, pursued avenues of legal recourse.[15]

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[14] On the basis of the evidence set forth above and the memoranda and directives received in evidence, I reject Respondents' contention that they never "instructed" Salesmen to collect from C.O.D. Accounts. An "order" or "directive" is not a prerequisite to establishing an assignment of duties which may constitute a change in terms and conditions of employment.

The contention is made that, even if there was a change in the working conditions of the Salesmen it was merely an effect of improvements involving Respondents' fiscal and credit policies, managerial prerogatives over which no bargaining is required. In support of this contention Respondents assert that the arrangement for collection of prepayment for merchandise was one between the Respondents and the customers of the Salesmen[16] in which the Salesmen merely played a voluntary role to accommodate their own customers. The evidence that these are the customers of the Respondents is too replete in the record to bear codifying.

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[15] Respondents did not present in their brief the argument previously stated as a defense that it was free to make unilateral changes at the time because the old contract expired on October 1, 1975 and the change was made during a period before a new agreement was reached, with Respondents' approval on November 6 of their tentative agreement of November 2, and Local 2's ratification on November 7. As was pointed out at the hearing, their expiring contract specifically provided for its continuation in full force during any period of negotiations beyond the expiration date. It is presumed that the Respondents have abandoned this argument and I need not discuss the absence of an impasse, the absence of prior bargaining on this subject, or the lack of merit of this argument under the prevailing legal precedent.

[16] Encompassed in this argument is the assertion that Salesmen were, by their own declaration, in business for themselves, and therefore, presumably not entitled to the protection of the Act. A glance at the work rules appended to Respondents' contract with Local 2, in evidence, lists no less than nine causes for the discharge of Salesmen. The duties of Salesmen set forth in the record and the authority over their performance exercised by Respondents, establishes that the Respondents assign, supervise, and take away from Salesmen the accounts they are to service, and establish quotas against which their performance is evaluated. The record amply supports the conclusion that they are employees of their respective wholesalers and qualify for the protections afforded by Section 7 of the Act.

Relying upon language in *Fiberboard* (379 U.S. 203), Respondents claim that collection procedures are credit policy decisions which "lie at the very core of entrepreneurial control" of a type "which Congress" did not intend "to encompass" within "conditions of employment" [17] and "which impinge only indirectly upon employment security." Finally, Respondent argues that "a change in operations motivated by legal, financial, credit or economic reasons is not an unfair labor practice under the Act."

It would be difficult to imagine any changes in operations which would not have one of the foregoing as a consideration. Clearly, this description of the perimeters of management prerogatives is much too broad and general. Analysis of the changes in the working conditions of Salesmen which were made by Respondents, as reflected in the record, reveals that this was not a policy decision relating to fiscal or credit policies of Respondents but rather was the reassignment of the collection duties from one group of employees (the drivers) to another group (the Salesmen) having no bearing upon the customers' credit standing, as such, or upon the Respondents' policies with respect to whether, and in what circumstances they would extend credit. The credit standing of C.O.D. Accounts for the most part is not determined by the Respondents, but is mandatory under State control. Nor was it a decision involving the expenditure of large amounts of capital by Respondents, discussed in the *General Motors'* decision quoted *supra*. It is simply the collection of payment for merchandise sold that is involved here. On the basis of the entire record I find that the performance of collection duties and the responsibility for releasing orders for delivery are duties falling within the term "working conditions" which are mandatory subjects of bargaining. Accordingly, I find that Respondents, and each of them did, without notice to the collective-bargaining representative of the Salesmen, make unilateral changes in the terms and conditions of employment of those Salesmen and that Respondents thereby violated Section 8(a)(5) and (1) of the Act.

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[17] Quoting from *General Motors Truck & Coach Div.*, 191 NLRB 951, aff'd 470 F.2d 422, which I find inapposite as it involved the decision to sell the business.

Upon the foregoing and the entire record in the case, I make the following:

Conclusions of Law

1. Respondents, Charmer Industries, Inc.; Park & Tilford & Motel & Club Divisions of Knickerbocker Liquor Corp.; Star Industries, Inc.; Standard Wine & Liquor Co., Inc., Peerless Importers, Inc.; and National Distillers Distributing Co., and each of them is, and has been at all times material herein, an employer within the meaning of Section 2(2) of the Act, and is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Liquor Salesmen's Union, Local 2 of the State of New York, Distillery, Rectifying, Wine & Allied Workers' International Union, AFL-CIO, and Local 816, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, are and each has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

3. At all times material herein, Local 2 has been, and is, the collective-bargaining representative of employees of each of the Respondents in unit appropriate under Section 9 of the Act described as follows:

> All licensed liquor salesmen, excluding all truck drivers, office clerical employees, all other employees, guards and all supervisors as defined in Section 2(11) of the Act.

4. Commencing on various dates between November 3, 1975 and November 13, 1975, and continuing to date, Respondents, and each of them, without notice to the collective-bargaining representative of the employees in the aforementioned units and giving said union an opportunity to bargain with respect thereto, made unilateral changes with respect to the terms and conditions of employment of said employees, and thereby refused to bargain and continue to refuse to bargain in violation of Section 8(a)(5) and (1) of the Act.

V. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondents, set forth in section IV, above, occurring in connection with their respective operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

VI. The Remedy

Having found that Respondents have engaged in, and each is engaging in, unfair labor practices proscribed by the Act, I shall recommend that they be ordered to cease and desist therefrom and to take the affirmative action set forth below in the recommended Order which are designed and found necessary to effectuate the policies of the Act.

The Charging Party has requested that the Board fashion a remedy which would require restoration of the *status quo ante*, notwithstanding the existing contract with the Teamsters, by reestablishing the same delivery schedules and freeing Salesmen from the need of expending unproductive time and money pursuing collections of prepayments for C.O.D. orders, on the ground that Respondents admittedly have been benefitted financially by the changes in the Salesmen's duties, and also fashion one which would require reimbursement to the individual Salesmen for the extra time and expenses incurred, requiring only simple proof from Salesmen. The Charging Party also requests that Respondents be required to reimburse the Board and the Charging Party for all litigation expenses incurred on the ground that the Respondents deliberately took positions, advanced frivolous defenses, and prolonged litigation as a sham, while benefitting financially.

I am not persuaded that the circumstances here sufficiently support the allegation of frivolous litigation to warrant requiring Respondents to bear the cost of such litigation. However, I shall recommend that the Respondents be ordered to restore the working conditions of Salesmen to that which obtained before November 1, 1975 with respect to delivery schedules and collections of prepayments for C.O.D. orders and to reimburse Salesmen for the added time and cost of performing their sales' duties resulting from Respondents' unlawful unilateral change in their working conditions,[18] with interest on such reimbursements in accordance with *Florida Steel Corporation*, 231 NLRB 117 (1977) and *Isis Plumbing & Heating Co.*, 138 NLRB 176 (1962).

Upon the foregoing findings of fact, conclusions of law, and the entire record in this case, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[19]

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[18] See *Pinewood Properties*, 242 NLRB No. 86.

[19] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

ORDER

Respondents, Charmer Industries, Inc.; Park & Tilford & Motel & Club Divisions of Knickerbocker Liquor Corp.; Star Industries, Inc.; Standard Wine & Liquor Co., Inc.; Peerless Importers, Inc.; National Distillers Distributing Co., and each of their officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain with Liquor Salesmen's Union, Local 2 of the State of New York, Distillery, Rectifying, Wine & Allied Workers' International Union, AFL-CIO, by unilaterally and without notice to, or bargaining with, the Union, making changes in the working conditions of Salesmen in the appropriate unit consisting of:

> All licensed liquor salesmen, excluding all truck drivers, office clerical employees, all other employees, guards and all supervisors as defined in Section 2(11) of the Act.

(b) In any like or related manner interfering with, restraining or coercing employees in the exercise of rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Cancel the unilateral changes heretofore made in the terms and conditions of employment of Salesmen in the above-described appropriate unit, restoring the *status quo ante* to those conditions which obtained prior to November 1, 1975 with respect to delivery schedules and collections of prepayments for C.O.D. orders as they related to the working conditions of Salesmen, and maintain such conditions until such time as Respondents negotiate in respect thereto with the representative of said employees, and reach agreement or an impasse.

(b) Make whole the employees in the said appropriate unit for any loss of time and any added expenses incurred as a result of the unilateral changes in working conditions of Salesmen, with interest thereon in the manner prescribed in the "Remedy" section of this Decision.

(c) Preserve and, upon request, make available to the Board or its agents for examination and copying all payroll records, social security payment records, timecards, personnel records and reports, and all other records relevant and necessary to a determination of compliance with this Order.

(d) Post at their respective offices in Metropolitan New York, copies of the attached notice marked "Appendix."[20] Copies of said notice, on forms provided by the Regional Director for Region 29, after being duly signed by Respondents' representatives, shall be posted by each of them immediately upon receipt thereof and be maintained for 60 consecutive days thereafter in conspicuous places, including all places where notices are customarily posted. Reasonable steps shall be taken by Respondents to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 29, in writing, within 20 days from the date of this Decision, what steps have been taken to comply herewith.

Dated, Washington, D.C. September 21, 1979

/s/ Jennie M. Sarrica
JENNIE M. SARRICA
Administrative Law Judge

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[20] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Astoria, Syossett, Long Island,
Brooklyn and New York, N.Y.

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case 29-CA-4885

CHARMER INDUSTRIES, INC.

Case 29-CA-4887

PARK & TILFORD & MOTEL & CLUB
DIVISIONS OF KNICKERBOCKER LIQUOR CORP.

Case 29-CA-4888

STAR INDUSTRIES, INC.

Case 29-CA-4889

STANDARD WINE & LIQUOR CO., INC.

Case 29-CA-4890

PEERLESS IMPORTERS, INC.

Case 29-CA-4891

NATIONAL DISTILLERS DISTRIBUTING CO.

and

LIQUOR SALESMEN'S UNION, LOCAL 2 OF THE STATE OF NEW YORK, DISTILLERY, RECTIFYING, WINE & ALLIED WORKERS' INTERNATIONAL UNION, AFL-CIO

ORDER DENYING MOTION FOR SUMMARY JUDGMENT AND DIRECTING HEARING

On August 31, 1977, the Regional Director for Region 29 of the National Labor Relations Board issued an Order Consolidating Cases, Complaint and Notice of Hearing in the above-entitled proceeding, alleging that all of the above-captioned Respondents have engaged in and are engaging in certain unfair labor practices affecting commerce within the meaning of Section 8(a)(5), 2(6) and (7) of the National Labor Relations Act, as amended. Subsequently, all of the Respondents filed answers, admitting in part and denying in part the allegations of the complaint, submitting affirmative defenses and requesting that the complaint be dismissed.

Thereafter, on October 11, 1977, Respondents filed a Motion for Summary Judgment, with exhibits attached, submitting that the Board grant their motion for summary judgment and dismiss the complaint on the ground that the alleged unfair labor practices were the subject of an arbitration proceeding which resulted in an opinion and award in favor of Respondents and that Respondents are entitled to a judgment on their First Separate and Distinct Affirmative Defense.[1]

The Board, having duly considered the matter, is of the opinion that Respondents are not entitled to summary judgment on the basis of their First Separate and Distinct Affirmative Defense for the reason that the Arbitrator's Award which is alleged to be dispositive of the matter demonstrates on its face that the Arbitrator ruled in favor of Respondents herein because the contract between the parties contained no provisions pertaining to the matters at issue herein, and that it precluded consideration of past practices relating to the matter. Hence, his award that the "Employers did not violate their contract with Local 2 when they adopted their present C.O.D. procedures," does not dispose of the unfair labor practice allegations of the complaint. Inasmuch as Respondents' answer to the complaint denies these allegations, these are factual matters and issues warranting Board determination based on record testimony developed at a hearing before an Administrative Law Judge. Accordingly,

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[1] In said defense, Respondents set forth certain data regarding the instant case, and cite the Board's *Collyer* and *Spielberg* doctrine *Collyer Insulated Wire*, 192 NLRB 837 (1971), *Spielberg Manufacturing Co.*, 112 NLRB 1080 (1955) in support of their position.

Subsequently, the Charging Party and the General Counsel filed statements in opposition to Respondents' motion for summary judgment; Respondents filed a reply in support of their motion for summary judgment. Thereafter, pursuant to an Order Transferring Proceeding to the Board and Notice to Show Cause, the General Counsel filed a response thereto and opposition to Respondents' motion for summary judgment; the Charging Party filed a supplemental in opposition to Respondents' motion for summary judgment; and the Respondents filed a memorandum in support of their motion for summary judgment.

IT IS HEREBY ORDERED that the Respondents' Motion for Summary Judgment be, and it hereby is, denied.

IT IS FURTHER ORDERED that a hearing be held before an Administrative Law Judge, to be designated by the Chief, Division of Judges, for the purpose of receiving evidence to resolve said issues.

IT IS FURTHER ORDERED that the proceeding be, and it hereby is, remanded to the Regional Director for Region 29 for the purpose of arranging such hearing, and that said Regional Director be, and he hereby is, authorized to issue notice thereof.

IT IS FURTHER ORDERED that, upon the conclusion of such hearing, the Administrative Law Judge shall prepare and serve on the parties a decision containing findings of fact, conclusions of law, and recommendations based upon the evidence received, and that, following the service of such decision upon the parties, the provisions of Section 102.46 of the Board's Rules and Regulations, Series 8, as amended, shall be applicable.

Dated, Washington, D.C., November 14, 1977.

By direction of the Board:

GEORGE A. LEET
Associate Executive Secretary

New York State Mediation Board
Case No. A76-1884
Arthur T. Jacobs
Arbitrator

IN THE MATTER OF THE ARBITRATION

between

LIQUOR SALESMEN'S LOCAL UNION 2
OF THE STATE OF NEW YORK

and

STAR INDUSTRIES, INC., et al.

Representation:

For the Union:

Harold Luxemburg, Esq.
Victor Feingold, Esq.

For the Employers:

Morton Schimmel, Esq.
James J. Dean, Esq.

Issue:

The parties could not agree on wording of the issue in dispute. They did finally agree to allow the Arbitrator to render a decision based on his understanding of the issue as developed during the hearing.

It is the Arbitrator's belief that the issue is whether the wholesale liquor industry's current procedure, begun November 1, 1975, for handling C.O.D. accounts violates the collective bargaining agreement dated November 1, 1975 and covering the period November 1, 1975-October 31, 1978, between the industry and the Union.

Background:

Under the New York State liquor law any retailer who fails to pay a liquor bill within forty (40) days of invoicing becomes delinquent, is placed on a Collect on Delivery list, and cannot be sold liquor by any wholesaler except by prepayment.

Prior to November 1, 1975, liquor shipped on a C.O.D. basis by wholesalers (the employers in this dispute) to retailers was paid for on delivery. The truck drivers picked up the retailers' payments.

Effective November 1, 1975 the industry and the Teamsters Local 816 representing the truck drivers entered into an agreement which prohibited the drivers from collecting C.O.Ds. Thereafter, the Salesmen faced the choice of collecting themselves or giving up the business of their C.O.D. customers. All or most of them evidently chose to collect for those C.O.D. customers who did not prepay directly to the companies.

It is the Union's contention that the employers' actions after November 1, 1975 with respect to C.O.D.s was a charade, that their real intent, given the realities of the business, was to force the salesmen to collect the C.O.D.s. They thereby, it claims, unilaterally imposed new work rules costing time and involving physical danger upon the salesmen.

No contract clause is involved. The Union rests its case on past practice although there is no clause in the contract requiring the continuance of past practice.

The basic facts are not in dispute. The salesmen concluded their negotiations with the employers on November 2. The membership ratified the contract on November 7. On November 2 and thereafter up to and including the day of the ratification meeting, the Union's officers learned from their members, the salesmen, that the drivers were no longer collecting C.O.D.s and that the wholesalers were informing the salesmen either in writing or orally of this fact.

The President of the Union, Joseph Matranga, informed Morris Edelman, General Counsel of the wholesalers, on November 3 that he was getting complaints from salesmen about C.O.D.s Mr. Edelman replied that the salesmen did not have to pick up the C.O.D.s. On the next day when Mr. Edelman called Mr. Matranga to inform him of the wholesalers' reactions to the proposed contract, Mr. Matranga again complained of the new C.O.D. arrangements. Again, Mr. Edelman told him that salesmen were not required to pick up C.O.D.s. On November 5th the two men met on a detail of the proposed contract and again, in response to further complaints about C.O.D.s by Mr. Matranga, Mr. Edelman reiterated that he should tell the salesmen they were not expected to pick up C.O.D. payments.

The Union's president at the ratification meeting on November 7th told its members:

> Without prior discussion with the Union, some employers circulated photocopies of a handwritten instruction that salesmen are to pick up C.O.D. payments. This is a violation of our contract, and I direct you that this change in our work rules shall not be honored by you . . .

Most of the wholesalers issued statements to their staffs explaining how C.O.D.s could be handled now that the teamsters no longer picked up such payments. They fundamentally are all worded in accord with Mr. Edelman's statements to Mr. Matranga. The language clearly is couched not as orders or requests to pick up C.O.D. payments but as explanations of the procedures to be followed should the salesmen process a C.O.D. order.

For example, Knickerbocker Liquor Corporation's memorandum of November 12, 1975 includes this language, the underlining being its:

> "Let me *re-emphasize* that this change in no way obligates salesmen to pick up cash, C.O.D. checks, or certified checks.

Another example, from the January 2, 1976 statement of Blue Crest Wine & Spirit Co., the underlining being its:

> *"It is the salesman's prerogative if he is aware of a C.O.D. order from his customer to collect from the customer."*

And Peerless Importers, Inc. in a November 12, 1975 memorandum after clarifying its procedure for handling C.O.D.s, stated:

> Any salesman *who avails himself* of this method . . . (underlining mine)

On November 12, 1975 Mr. Matranga sent a letter "To All Wholesale Distributors Having Contractual Relations With Liquor Salesmen's Union, Local 2, State of New York," which included the assertion that:

> . . . some or all of the employers have instructed the employees to pick up payment in advance from all customers who are on a Cash or C.O.D. basis.

To which Mr. Edelman replied on November 13:

> . . . you have misstated the facts when you assert that the employers unilaterally and without notice changed a working condition.

In fact, the salesman by and large do collect on C.O.D.s. Testimony of many salesmen also proved conclusively that service of a C.O.D. account is more costly and time consuming than of a non-C.O.D. account. Sometimes, too, when cash is collected, it is quite dangerous, especially in high crime areas and at night: many C.O.D.s are small bar owners who only operate after nightfall.

Why do salesmen collect C.O.D.s? The Union contends that they do because they must. They must because

C.O.D.s constitute approximately 25% of their accounts on the average, somewhat less of their dollar sales, and to make a living the salesmen believe they must service them. Their earnings come entirely out of commissions. Even though the salesmen admitted that their employers have not ordered them to service C.O.D.s, economic imperative compels them to. Hence, the employers' repeated statements that the salesmen are not obligated to handle C.O.D.s is, says the Union, a "sham."

That sham is demonstrated, the Union argues, by the fact that all the companies have established procedures, some including the addition of extra clerks and extra telephones, just to take care of C.O.D.s when the salesmen call in such orders. The wholesalers act, says the Union, as though they expect the salesmen to get C.O.D. orders, which can only be obtained by collecting cash, money orders, or certified checks in advance of dispatch of drivers with the deliveries.

The companies reply that the economic compulsion cited by the Union is fictitious, because (1) many of the salesmen collected cash on C.O.D. accounts to assure deliveries to them after 1963 when drivers under Teamsters Local 816 were prohibited from accepting cash on C.O.D.s, (2) many C.O.D. customers are permitted to furnish the wholesalers with blank, signed checks and so can telephone their orders without requiring a visit or any time, even on the telephone, by the salesman, and (3) the salesmen instead of wasting time on those C.O.D.s, which do require considerable time, additional costs, and perhaps the risk of bodily injury and robbery could instead use that time equally or more profitably to sell retailers who are not yet customers of the wholesale house the salesmen work for, and such potential accounts number in the hundreds.

And they insist that they are quite willing to give up C.O.D. sales, that they only handle them to accommodate their salesmen, that while they appreciate the sales that come out of C.O.D.s, such sales are not a job responsibility of the salesmen.

They argue, further, that the Union had 4-5 days prior to the November 7, 1975 ratification meeting to demand negotiations over C.O.D.s and to refuse ratification of the contract, but it did not; and that the Union's attempt to get special treatment for C.O.D.s, is premature—it should bring that demand up at the negotiating table when the present contract expires.

The remedy sought by the Union should the Arbitrator agree that contract was breached is either the institution of a special collection procedure or a 1% additional commission on C.O.D.s to compensate for the higher cost of servicing them. It acknowledges that the Arbitrator has no power to turn the clock back by requiring the wholesalers and Teamsters Local 816 to drop the prohibition on C.O.D. collections from their contract.

Opinion:

It is easy to understand why the liquor salesmen are so upset by the current C.O.D. arrangement: A substantial additional workload and some personal danger are added to their work life if they choose to handle C.O.D. orders. To abandon these customers and seek to replace them with new accounts is not simple. It means often abandoning customers of long standing, whose financial difficulties may be temporary and who could eventually be excellent accounts again. It means too giving up steady repeat orders upon which they have long depended for part of their income. Moreover, he knows that if he does not service the C.O.D. account, a salesman for another wholesaler probably will. As the testimony clearly showed, the industry as a whole does not lose C.O.D. sales as long as the affected retailer stays in business; it is only a question which salesmen and, therefore, which wholesaler will get the sale.

To seek to replace them with new accounts is a gamble, which may pay off, and well, but again which may not, thereby leaving the salesmen over all poorer. Going after new accounts also means seeking to take away business from a salesman selling the same brands for another wholesaler. The sad fact from the salesman's point of view is that, except for a small number with exclusive rights to a few brands, each salesman generally competes with the salesmen representing other wholesalers, all selling the same brands at the same prices.

I can empathize with the salesmen and understand their deep feelings of frustration and of being "put upon." But I cannot find that the employers have violated either the direct wording of the contract or any meaningful concept of past practice.

The contract contains no provisions governing C.O.D.s; nor does it contain a past practice clause. In the absence of a past practice clause, arbitrators including this one, and the courts have nevertheless frequently found that past practice was significantly implied in the contractual relations involved and could be used to justify a decision and an award.

I cannot so find here for several reasons which stem from the limitations of the contract. First, the salesmen although called employees are basically independent entrepreneurs (like manufacturer representative), who get and service accounts on their own and whose earnings, other than expense money, depend entirely on their ability to win and hold accounts and on the size of the orders they extract from them. The companies do not care where or how the salesmen sell, as long as they observe the law and as long as they produce a minimally adequate volume of sales. The companies under the collective bargaining contract pay a commission to a salesman on every order coming from his assigned territory, whether or not the order was solicited by the salesman, but essentially they treat the salesmen as men who are on their own. How they spend their time—on old accounts or soliciting new accounts, on C.O.D.s or non-C.O.D.s, or at the beach—is up to them. Supervision is non-existent except in most firms through weekly sales meetings which cover general items. No reports are required of the salesman to show even how they spend their working time.

Past practice in the industry did not require the salesmen to collect on their C.O.D. accounts. Present practice is the same. It is the individual salesman who decides for himself whether to do so or not. If he decides to collect, then it is he who is going contrary to past practice and deliberately so. The companies are being consistent. They did not require salesmen to pick up C.O.D.s prior to November 1, 1975 and they have told the salesmen consistently since that they are not obligated to do so.

In the light of this very special employee status and of the companies' care to emphasize to the salesmen from November 2, 1975 on that whether or not they serviced C.O.D. accounts was entirely their prerogative. It is impossible to find that the companies have been directing or ordering or mandating that the salesmen must service C.O.D.s.

Secondly, when bona fide grievances do occur during the life of a contract, there is almost always an obvious remedy. In this situation, none exists. This arbitrator, as Local 2 acknowledges, has no power to alter the contract between Teamster Local 816 and the wholesalers; therefore, I cannot require the drivers to collect on C.O.D.s, as they did under contract prior to November 1, 1975.

Nor can I adopt the chief remedy advocated by the Union—adding 1% commission for C.O.D. sales to the present commission on all sales. If there is anything clearly reserved in labor management relations exclusively for negotiations rather than contract interpretation, it is the setting of new rates of pay or, in lieu thereof as here, of commissions.

Nor do I believe that I have the power to require the companies to establish some procedure unspecified by the Union and left to me presumably to design for collecting C.O.D.s without the use of salesman. Clearly, establishing a way of collecting money due is a management prerogative. Moreover, such an arrangement already exists: the C.O.D. accounts may, if their credit is acceptable to the company, leave the signed checks on deposit with the company; in lieu of signed checks they can send in or deliver cash or a money order. The "catch" here is that this system is not acceptable to the salesmen. If all the salesmen would insist that their C.O.D. accounts prepay, the problem would vanish. But each fears that if he does not collect the cash, money order, or certified check, and save the C.O.D. account the time otherwise taken by it to prepay in person or by mail, the account will be lost to a salesman from another company who will so service the account.

The Union's argument that the wholesalers are engaging in a "sham," while conceivably true, was not proved by the testimony. The many salesmen who testified only proved what I just described: an industry where although they are represented by the same Union, each company's salesmen compete against the salesmen of the other wholesalers and as a group they have been unwilling or unable to require all of the Union's members to forego collections on C.O.D. accounts and to force such accounts to pay for their goods by themselves delivering or mailing cash, a money order, or a certified check to the companies.

Award

The Employers did not violate their contract with Local 2 when they adopted their present C.O.D. procedures.

/s/ Arthur T. Jacobs
ARTHUR T. JACOBS
Arbitrator

April 7, 1977

SUPREME COURT OF THE UNITED STATES

No. A-573

LIQUOR SALESMEN'S UNION OF THE STATE OF NEW YORK,
LOCAL 2, DISTILLERY, RECTIFYING, WINE AND ALLIED
WORKERS INTERNATIONAL UNION, AFL-CIO,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including February 17, 1982.

/s/ Thurgood Marshall
Associate Justice of the Supreme
Court of the United States

Dated this 28th day of December, 1981.

Opposition

1

Supreme Court, U.S.
FILED
APR 21 1982
STEVAS
CLERK

No. 81-1544

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

LIQUOR SALESMEN'S UNION OF THE STATE OF NEW YORK, LOCAL 2, DISTILLERY, RECTIFYING, WINE AND ALLIED WORKERS INTERNATIONAL UNION, AFL-CIO,

Petitioner,

vs.

CHARMER INDUSTRIES, INC., STAR INDUSTRIES, INC., STANDARD WINE & LIQUOR CO., INC., PEERLESS IMPORTERS, INC., NATIONAL DISTILLERS DISTRIBUTING CO., PARK & TILFORD & MOTEL & CLUB, DIVISIONS OF KNICKERBOCKER LIQUORS CORP., and NATIONAL LABOR RELATIONS BOARD,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI FOR RESPONDENTS CHARMER INDUSTRIES, INC., STAR INDUSTRIES, INC., STANDARD WINE & LIQUOR CO., INC., PEERLESS IMPORTERS, INC., and NATIONAL DISTILLERS DISTRIBUTING CO.

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Counterstatement of Question Presented

Whether this Court should review a court of appeals' decision disapproving, as an abuse of discretion, the National Labor Relations Board's refusal to defer to an arbitral award, where the court held the Board's misconstruction of the award led it to violate its own arbitration deferral standards.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1544

LIQUOR SALESMEN'S UNION OF THE STATE OF NEW YORK, LOCAL 2, DISTILLERY, RECTIFYING, WINE AND ALLIED WORKERS INTERNATIONAL UNION, AFL-CIO,

Petitioner,

vs.

CHARMER INDUSTRIES, INC., STAR INDUSTRIES, INC., STANDARD WINE & LIQUOR CO., INC., PEERLESS IMPORTERS, INC., NATIONAL DISTILLERS DISTRIBUTING CO., PARK & TILFORD & MOTEL & CLUB, DIVISIONS OF KNICKERBOCKER LIQUORS CORP., and NATIONAL LABOR RELATIONS BOARD,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI FOR RESPONDENTS CHARMER INDUSTRIES, INC., STAR INDUSTRIES, INC., STANDARD WINE & LIQUOR CO., INC., PEERLESS IMPORTERS, INC., and NATIONAL DISTILLERS DISTRIBUTING CO.

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit denying enforcement of an order of the National Labor Relations Board ("Board") is officially reported at 664 F.2d 318 (2d Cir. 1981), and is also reproduced in the Appendix to the Petition for Certiorari at 1a-20a ("A. —").[1]

The Decision and Order of the Board is officially reported at 250 N.L.R.B. 293 (1980), and is reproduced at A. 25a-30a. The decision and recommended order of the Administrative Law Judge ("ALJ") appears at A. 31a-54a. The Board's prior Order denying a motion for summary judgment appears at A. 55a-57a.

The Opinion and Award of Arbitrator Arthur T. Jacobs appears at A. 58a-66a.

Jurisdiction

Respondents Charmer Industries, Inc., Star Industries, Inc., Standard Wine & Liquor Co., Inc., Peerless Importers, Inc. and National Distillers Distributing Co., Inc. ("Companies") assert no jurisdictional questions.

Counterstatement of the Case

The Companies are engaged in the wholesale distribution of alcoholic beverages to restaurants, bars, liquor stores, hotels and the like in the New York City metropolitan area. The Companies employ, *inter alios,* salesmen and truck drivers. The salesmen and the drivers are represented for purposes of collective bargaining by two separate unions.[2]

---

[1] The Court of Appeals order denying the Petition for Rehearing appears at A. 23a-24a.

[2] Petitioner Liquor Salesmen's Union of the State of New York, Local 2, Distillery, Rectifying, Wine and Allied Workers International Union, AFL-CIO ("Local 2"), represents the Companies' salesmen. Local 816 of the International Brotherhood of Teamsters ("Local 816") represents the Companies' drivers and helpers. Only Local 2 is a party to this litigation.

This case had its genesis in 1975. Separate collective bargaining agreements between the Companies and Local 2 and Local 816 were due to expire on October 31, 1975. A. 4a. Accordingly, during 1975, the Companies were engaged in simultaneous but independent collective bargaining with the two unions. A. 3a-4a. In the final hours of the negotiations with Local 816, on October 31, 1975, an agreement was reached, including the Companies' acceptance of that union's demand that drivers be relieved of their prior responsibility to collect payments from customers whose accounts were in Collection On Delivery ("C.O.D.") status. A. 4a.

Meanwhile, separate negotiations between Local 2 and the Companies were proceeding and resulted in a tentative agreement on November 2, 1975. That proposal was expressly subject to approval by the Companies, and certain fringe benefits were left open for further discussion. A. 40a. Similarly, Local 2 had to submit the tentative agreement to its membership for a ratification vote.

The Companies accepted the proposal on November 6, 1975. A. 40a. Upon an affirmative ratification vote by Local 2's membership on November 7, 1975, a contract existed between the parties. A. 5a.

On November 3, 1975, the first business day of operating under its new contract, Local 816's drivers did not collect payments from customers on C.O.D. status, and merchandise was being returned to the Companies. A. 4a. Local 2 and individual salesmen were aware of the elimination of the drivers' collection duties by November 3. A. 59a-60a.

Also on November 3, one of the Companies communicated to its salesmen regarding the handling of C.O.D. accounts, stating that customers could mail checks, or that salesmen could pick up checks, after which the order would be shipped. A. 4a. Certain salesmen complained to Local 2 about this change in the handling of C.O.D. accounts and what they perceived as an added burden on them. A. 4a.

Thus, as noted by the court below, "by the time of the Local 2 ratification meeting on November 7, the union was aware of the change in collection procedures." A. 4a-5a. At that meeting, the President of Local 2 responded to complaints by salesmen about the C.O.D. situation by announcing his view that the new procedures violated the contract, and instructing them not to collect payments from C.O.D. customers. A. 5a. Rather than demand further bargaining on this particular issue, the Local 2 membership thereupon ratified the proposal. *Id.*

On November 12, 1975, Local 2's President wrote two letters concerning the Companies and their salesmen. A. 6a. One, sent to the Companies, complained of the new C.O.D. procedures. *Id.* The other, sent to the Companies' counsel and chief negotiator, enclosed a final draft of the new contract, and requested his approval so that copies could be prepared for formal execution. A. 6a.

Shortly after the new collective bargaining agreements became effective, the Companies circulated to their salesmen announcements outlining and clarifying C.O.D. procedures. Contrary to Local 2's assertions in the Petition for Certiorari at 3 ("Pet. at —"), the new C.O.D. procedures did *not* require salesmen to pick up payments. *See* A. 60a-61a. Rather, the Companies' announcements set forth three options concerning delivery of goods and receipt of payment from C.O.D. customers: customers could (1) mail checks to the Companies; or (2) leave with the Companies signed blank checks; or (3) give checks directly to the salesmen. A. 5a. Notwithstanding these options, Local 2 filed unfair labor practice charges with the Board, claiming the C.O.D. procedures constituted an unlawful unilateral change in working conditions. Those charges were subsequently withdrawn. A. 6a-7a.

Following the withdrawal of its unfair labor practice charges, Local 2 served on the Companies a notice of intention to arbitrate in accordance with provisions set forth in the recently negotiated collective bargaining agreements. A. 6a-7a.[3] Subsequently, Local 2 filed additional unfair labor practice charges against the Companies; these were held in abeyance pending resolution in the arbitration proceeding. A. 7a.

The arbitration took place under the auspices of the New York State Mediation Board, with all parties represented by counsel. A. 58a. Local 2's grievance was denied in an arbitration award dated April 7, 1977. A. 58a-66a.

As noted by the court below, the Arbitrator issued a "careful opinion", concluding that "[t]he Employers did not violate their contract with Local 2 when they adopted their present C.O.D. procedures." A. 7a; A. 66a. This conclusion is rooted in the Arbitrator's findings that the collective bargaining agreements contained no provisions governing C.O.D. procedures. A. 7a.

Moreover, as urged by Local 2 (A. 59a), the Arbitrator went beyond the four corners of the contract to assess Local 2's claim that the C.O.D. procedures conflicted with the "past practice" of the parties. He squarely addressed and then rejected Local 2's contention that the C.O.D. procedures constituted a mandatory change in the salesmen's duties:

> Past practice in the industry did not require the salesmen to collect their C.O.D. accounts. Present practice

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[3] Local 2 obtained an order compelling the Companies to arbitrate, and denying the Companies' motion for a stay of arbitration. *Charmers Industries, Inc.* v. *Liquor Salesmen's Union, Local 2,* 415 F.Supp. 781 (S.D.N.Y. 1976). The Companies did not appeal.

> is the same. It is the individual salesman who decides for himself whether to do so or not. If he decides to collect, then it is he who is going contrary to past practice and deliberately so. The companies are being consistent. They did not require salesmen to pick up C.O.D.'s prior to November 1, 1975 and they have told salesmen consistently since that they are not obligated to do so.

A. 65a.

Upon receiving the arbitration award adverse to its cause, Local 2 attempted to revive the unfair labor practice charges which had been held in abeyance. A. 7a-8a. The Board's Regional Director refused to issue a complaint against the Companies, concluding that it was appropriate under the Board's own arbitration deferral standards to defer, for the award "deal[t] squarely with the substance of the asserted violations of Section 8(a)(5)" of the National Labor Relations Act ("Act"). A. 9a. Local 2 appealed this determination to the Board's General Counsel, who reversed and instructed the Regional Director to issue a complaint. A. 9a.

The Companies subsequently moved for summary judgment on the ground that the Board should defer to the arbitration award. The Board denied this motion. A. 9a-10a; 56a-57a.

Following denial of the summary judgment motion, an unfair labor practice hearing was conducted by an ALJ of the Board. The ALJ did not directly address the reasoning or conclusion of the Arbitrator, but instead "assert[ed] only that the Board's refusal to defer to the award [on the summary judgment motion] was binding on her as the law of the case." A. 10a; *see* A. 33a. In its Decision and Order dated June 30, 1980, the Board, *inter alia,* again failed to defer to the decision of the Arbitrator. *See* A. 25a-30a.

On the Companies' petition for review and the cross-applications for enforcement by Local 2 and the Board, the Court of Appeals for the Second Circuit held that the Board abused its discretion in refusing to defer to the Arbitrator's award:

> [The Board] misconstrued the arbitrator's award and, relying exclusively on its misconstruction, "blithely ignored" its own standards [for deferral to arbitral awards].

A. 18a.

Consequently, the court denied enforcement of the Board's Order. A. 3a.

It is against this background that Local 2's Petition must be measured. As will be seen, the foregoing facts do not give rise to any significant issue of far-reaching importance warranting review by this Court.

Summary of Argument

The court of appeals' rejection of the Board's failure to defer to an arbitration award was founded upon the Board's misconstruction of the factual basis of that award. The court then concluded that this misconstruction led the Board to misapply its own arbitration deferral criteria. That a court of appeals denied enforcement and set aside the Board's order for such a factual error hardly presents the kind of far-reaching and significant issue meriting review by this Court.[4]

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[4] The Board's position, as expressed in its own brief to this Court, embraces this view regarding certiorari. Board Memorandum at 5-6. ("Board Mem. at —").

Local 2's suggested conflict between the courts of appeals is illusory; analysis of the cases Local 2 contends conflict with the decision below discloses that the different results were prompted by the different fact patterns in each case. So long as the courts of appeals continue to conscientiously fulfill their duty to insure that the Board adheres to its own arbitration deferral criteria, they will no doubt continue to reach varied results as to the propriety of deferral in any given matter. But this does not produce a "conflict" among the courts of appeals necessitating Supreme Court intercession.

Equally without merit is Local 2's suggestion that the court below misconceived certain sections of the Act in rebuffing the Board for its failure to defer to the arbitral award. It was the Board which misconceived the Arbitrator's findings of fact. This prompted the court below to rule that the Board could not rely upon its own misconstruction of the award as justification for its refusal to defer to an award which otherwise satisfies the Board's own deference criteria.

Finally, Petitioner's belief that the court of appeals was restricted to remanding this case to the Board is simply incorrect.

ARGUMENT

POINT I

The Facts and Issues Presented by This Case Do Not Merit Supreme Court Review.

We note initially that the decision below does not challenge or threaten to undermine the Board's long-standing policy of deferring to arbitration awards. Rather, Chief Judge Feinberg's opinion endorses and applies the arbitration deferral criteria set forth in *Spielberg Manufacturing Co.,* 112 N.L.R.B. 1080 (1955) and *Suburban Motor Freight, Inc.,* 247 N.L.R.B. 146 (1980). The Board recognizes as much and does not fault the reasoning of the decision below, observing that the court of appeals applied "the standard enunciated by the Board in *Suburban Motor Freight, Inc.* . . . ." Board Mem. at 4.

The bombastic tenor of the Petition should not be permitted to obscure the clarity of Chief Judge Feinberg's opinion. The court below did no more than assess whether the Board adhered to its own stated deferral criteria. In so doing, the court displayed a fidelity to the obligation of reviewing courts to "insure that [the Board] adheres to its own standards until they are properly changed by the Board." *Hawaiian Hauling Service, Ltd.* v. *NLRB,* 545 F.2d 674, 676 (9th Cir. 1976), *cert. denied,* 431 U.S. 965 (1977).

Indeed, if the alarm sounded by Local 2 rang true, presumably the Board would have initiated, or at least joined in, the request for review by this Court. What Local 2 puffs as an abrogation of the Board's jurisdictional authority to make *de novo* post-arbitral findings of fact, the Board itself deflates as a mere "disagreement between the

Board and the appellate court . . . turning on the factual analysis of a particular arbitral decision. . . ." Board Mem. at 5.

The Board accurately perceives the significance of the decision below. Plainly stated, no "special and important reasons" for review on writ of certiorari as contemplated by this Court's Rule 17 exist here. Chief Judge Feinberg held merely that the Board was not entitled to enforcement of its order in a case where the Board abused its discretion by refusing to defer to an award based on a "simply incorrect" rationale. A. 16a.

By insisting that the Board adhere to its own "laboriously developed standards of deference" (A. 19a), the court below was guarding against the deleterious consequences of allowing the Board to "blithely ignore" those standards:

> depriving parties to collective bargaining agreements of a reasonable expectation of finality in properly conducted arbitrations and significantly undermining the value and efficacy of arbitration as an alternative to the judicial or administrative resolution of labor disputes.

A. 19a.

Because the crux of this controversy turns on the construction of an arbitrator's award, any significance of the decision below beyond the parties hereto is virtually nonexistent. In this circumstance, Justice Rehnquist's recent observation is apt:

> To remain effective, the Supreme Court must continue to decide only those cases which present questions whose resolution will have immediate importance far beyond the particular facts and parties involved.

Boag v. *MacDougall*, —— U.S. ——, 102 S.Ct. 700, 702 (1982) (Rehnquist J., dissenting).[5]

In addition to the fact-intensive nature of this case, other factors likewise militate against granting a writ of certiorari. We urge the Court to bear in mind that Local 2 has come before this Court urging that the arbitration award it vigorously sought should not be adhered to. Local 2 strenuously resisted the Companies' reluctance to arbitrate and obtained an order compelling arbitration. *See Charmers Industries, Inc.* v. *Liquor Salesmen's Union, Local 2*, 415 F.Supp. 781 (S.D.N.Y. 1976). Moreover, prior to the arbitration, Local 2 withdrew previously filed unfair labor practice charges, thereby highlighting the union's apparent conviction that the arbitral forum was preferred. It was only following the adverse arbitral award that Local 2 sought to revive proceedings before the Board. A. 8a. In short, it is plain that Local 2 presses for certiorari here not out of some highminded concern for the institutional integrity of the Board, but rather in an effort to obtain a result more to its liking than that obtained in its forum of first choice: arbitration.

The impact of intervening events since this dispute arose in 1975 also weighs against granting the Petition. As noted in the decision below, it was represented at oral argument that Local 2 and the Companies bargained over the C.O.D. procedures in 1978. A. 19a. No change in the C.O.D. procedures was effected. *Id.*[6] In other words, Local 2 has already obtained the relief it has sought throughout this litigation—the opportunity to bargain about the C.O.D. procedures. Accordingly, as Chief Judge Feinberg noted, to order bargaining "in so stale a dispute originally caused by the exigencies of simultaneously bargaining with two unions almost six [now more than seven] years ago, has a distinct air of unreality about it. . . ." A. 19a. Similar considerations militate against further review by this Court.

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[5] Justice Rehnquist was quoting from Chief Justice Vinson's Address before the American Bar Association, September 7, 1949.

[6] Although not part of the Record, as counsel for the Companies, we can represent that the 1981-1984 collective bargaining agreements negotiated by Local 2 with the Companies likewise reflect no change in the C.O.D. procedures implemented in 1975.

For all of these reasons, the Companies submit that the decision below does not warrant review by this Court. And, as we next show, the reasons advanced by Local 2 in support of the Petition fall woefully short of demonstrating any basis for this Court to grant further appellate review in this already protracted proceeding.

POINT II

Local 2 Has Failed to Advance Any Persuasive Reasons for This Court to Grant Certiorari.

Distilled of its rhetoric, the Petition reduces to four arguments: (1) that the decision below conflicts with "persuasive appellate authority", Pet. at 10-11; (2) that the decision below reveals a "general disarray of the courts of appeals", Pet. at 11-12; (3) that the decision below "misconceives the law", Pet. at 12-17; and (4) that the court of appeals' denial of enforcement of the Board's Order, instead of an order of remand, was "manifest error", Pet. at 17-18. Even assuming *arguendo* that these tendered grounds might otherwise suffice to justify certiorari, the fact of the matter is that Local 2's proffered reasons for the writ are not substantiated by fact or analysis. We discuss them *seriatim*.

A. *The Decision Below Does Not Conflict With Decisions of Other Courts of Appeals.*

Local 2 carefully restricts its predictable "conflict" argument to an alleged conflict between the decision below and a single decision of the Ninth Circuit, *Alfred M. Lewis, Inc.* v. *NLRB*, 587 F.2d 403 (9th Cir. 1978). Pet. at 10.[7] *Lewis*, however, is readily distinguishable on the law and facts. And Ninth Circuit decisions subsequent to *Lewis* reflect a remarkable degree of harmony with the decision below, further undermining Local 2's transparent effort to construct from *Lewis* a "conflict with the decision of another court of appeals on the same matter. . . ." Sup. Ct.R. 17.1(a).

In *Lewis*, the arbitrators and the Board were in agreement that an employer had unilaterally imposed a new mandatory production quota system with attendant disciplinary sanctions on its employees. The Board diverged from the arbitrators on the *legal significance* of this common finding of fact. Holding that the arbitrators' endorsement of the employer's action was contrary to settled Board precedent and "clearly repugnant" to the Act, the Board declined to defer to it. *See* 587 F.2d at 407-408. The Ninth Circuit concurred that the arbitral result conflicted with the settled principle that an employer has no legal right to impose such new mandatory work rules without prior bargaining. *Id.* at 408.

Here, in contrast, the Arbitrator and the Board diverge on a question of fact: whether the C.O.D. procedures at issue constituted a unilateral required change in the terms and conditions of the salesmen's duties. The Arbitrator concluded that neither before nor after the 1975 negotiations were the salesmen required to collect on their C.O.D. accounts. A. 65a. Rather, "[i]t is the individual salesman who decides for himself whether to do so or not. If he decides to collect, then it is he who is going contrary to past practice and deliberately so." A. 65a.

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[7] Local 2's related suggestion that the decision below reflects what it styles a "disarray" among the courts of appeals is refuted *infra* at 16-21.

Notwithstanding this clear factual conclusion by the Arbitrator, who was in the best position to make this judgment (A. 16a), the Board refused to defer to the award, mistakenly asserting that the Arbitrator ruled as he did solely "because the contract between the parties contained no provisions pertaining to the matters at issue herein, and that it precluded consideration of past practices relating to the matter." A. 56a-57a. However, as Chief Judge Feinberg recognized, this proffered basis for refusing to defer to the award "is simply incorrect . . . the arbitrator plainly did consider past practice relating to C.O.D. collections, concluding that the companies had not departed from past practice." A. 16a.

Thus, unlike *Lewis,* where the Board declined to defer to the arbitrators' award due to clear legal error by the arbitrators, here the Board "declined to defer to an arbitrator's award that satisfied all of the criteria the Board has set, on grounds that do not withstand even casual scrutiny." A. 16a. To suggest that a "conflict" exists between these two obviously distinguishable cases is plainly wrong.

Moreover, Ninth Circuit decisions subsequent to *Lewis* confirm the absence of any significant conflict between the Second and the Ninth Circuits regarding review of Board arbitration deferral decisions. For example, in *Douglas Aircraft Co.* v. *NLRB,* 609 F.2d 352 (9th Cir. 1979), the court held the Board abused its discretion by refusing to defer to an arbitral decision, even though one of two alternative constructions of the decision would have been repugnant to the Act. Because there was a lawful alternative interpretation of the award, the court held it was entitled to deference. *Id.* at 355. Like the court below, the Ninth Circuit was mindful of its obligation that "[i]n reviewing the Board, we must insure that it adheres to its own standards until they are properly changed by the Board." *Id.* at 354 (citation omitted).

The Ninth Circuit's reasoning in *Ad Art, Inc.* v. *NLRB*, 645 F.2d 669 (9th Cir. 1980), further undermines any notion of a conflict between the two circuits on the proper approach in arbitration deferral cases. The court below based its conclusion that the Board abused its discretion on the Board's factual error; the Ninth Circuit agrees that where factual issues are paramount, deference to arbitration awards is especially appropriate:

> When an unfair labor practice rests on factual issues of contract interpretation, the arbitrator may be in a superior position to resolve the merits of the unfair labor practice. *See Bloom* v. *NLRB*, 603 F.2d 1015, 1020 (D.C.Cir. 1979). Similarly, where resolution of the unfair labor practice charge involves mainly factual, as opposed to statutory, issues the arbitrator's decision should not be ignored by the Board. *Stephenson* v. *NLRB*, 550 F.2d [535] at 538 n.4 [9th Cir. 1977].

Id. at 676.

The reasoning of the court below is entirely consistent with this recent pronouncement of arbitration deferral standards by the Ninth Circuit in *Ad Art:*

i. The unfair labor practice alleged "rests on factual issues of contract interpretation";

ii. Resolution of the unfair labor practice charge "involves mainly factual, as opposed to statutory, issues";

iii. The arbitrator should be recognized as being "in a superior position to resolve the merits of the unfair labor practice" which derives from such factual (as opposed to statutory) issues of contract interpretation; and

iv. In such circumstances "the arbitrator's decision should not be ignored by the Board."

In sum, the consistency of reasoning and approach between the Ninth Circuit's *Ad Art* opinion and the decision below refute Local 2's suggestion of a conflict between the circuits.

B. *Contrary to Local 2's Suggestion, the Courts of Appeals Are Not in "Disarray" Over the Board's Arbitration Deferral Standards.*

Analysis of the cases Local 2 cites to show a purported "disarray", Pet. at 11-12, reveals nothing sufficient to support the claim. What Petitioner characterizes as disarray is, in reality, nothing more than the predictable divergence of results reached by courts reviewing the Board's application of its arbitration deferral criteria to widely varying fact patterns.

Because the integrity of the Board's arbitration deferral standards are nowhere at issue in this case, a general pronouncement regarding arbitration deferral by this Court would hardly guarantee uniformity of result in the courts below, or even deter litigation in the arbitration deferral context. Parties aggrieved by an adverse ruling on the deferral question would presumably remain as free to seek judicial review of that ruling as they have been since the Board's decision in *Spielberg* more than twenty-five years ago. The decision below has not altered the arbitration deferral criteria; it has enhanced their stability by signaling to litigants and the Board alike that the courts will enforce those criteria as written by the Board.

Further, a review of the cases Local 2 cites in support of this supposed disarray shows they are easily reconcilable with the decision below.

For example, in *NLRB* v. *Gould, Inc.*, 638 F.2d 159 (10th Cir. 1980), *cert. denied sub nom., Brown Boveri Electric, Inc.* v. *NLRB*, —— U.S. ——, 101 S.Ct. 3065 (1981), the arbitrator "failed to address" issues presented to him by the union, and made an erroneous legal assumption that a sympathy strike was an "illegal strike." 638 F.2d at 166. Both the Board and the Tenth Circuit faulted the arbitrator's assumption, without discussion, that a sympathy walkout was unprotected by section 7 of the Act. *Id.* Concluding that this assumption was "clearly repugnant" to the Act, and in conflict with "a long line of Board and court precedent", the Tenth Circuit declined to hold that the Board abused its discretion by not deferring. *Id.* In contrast, the Arbitrator here did address the issues presented to him by the union and made no erroneous legal assumptions. Recognizing that the award satisfied the deferral criteria, the decision below simply held that the Board's misconstruction of the award led the Board to violate its own deferral standards.

St. Luke's Memorial Hospital, Inc. v. *NLRB*, 623 F.2d 1173 (7th Cir. 1980), is similarly unsupportive of Local 2's quest for courts of appeals opinions aligned against the decision below. In *St. Luke's*, the court noted three bases upon which the arbitration award failed to meet the Board's arbitration deferral criteria: the method of selecting the arbitrator was "dubious"; the arbitrator failed to discuss thoroughly whether the alleged misconduct of employees had been condoned by the employer; and the arbitrator did not clearly decide the unfair labor practice issues. *Id.* at 1178. The first two grounds have not been asserted here. As to the third ground, the Arbitrator here did decide the unfair labor practice issues. As the Second Circuit noted:

> [the Arbitrator's] determination, however, was necessarily dispositive of the statutory issue: if no change in working conditions was imposed, no duty to bargain arose and no unfair labor practice could have been committed. Because both the contractual and statutory issues rest on the same factual determinations, the arbitrator's better position and expertise as a fact-finder strengthen the case for deference to his findings.

A. 15a.

Local 2's suggestion that the First Circuit opinion in *Pioneer Finishing Corp.* v. *NLRB,* 667 F.2d 199 (1st Cir. 1981), conflicts with the decision below is nothing short of baffling, for Chief Judge Coffin's opinion twice cites the decision below with approval. *Id.* at 202. Significantly, those citations were for the proper review standard to be applied by the courts of appeals, and for the proposition that resolution of "the contractual issues may determine the statutory issues . . . when the statutory and contractual issues are congruent because they rest on the same factual determinations." *Id.*

Moreover, *Pioneer,* like *Gould* and *St. Luke's,* but unlike the case at bar, all involved individual employee disciplinary arbitrations. As observed by Chief Judge Feinberg, this case is different in principle from individual situations:

> In addition, this case presents what might be regarded as a congruence of interests, in that the union's claim primarily involves an asserted right affecting the union as a whole—a "group right" to certain working conditions. It is thus not a case in which an arbitrator's award affects rights of individuals or groups not directly party to the arbitration—as, for example, when

> a dispute arising out of an allegedly discriminatory discharge of an individual employee is brought to arbitration. *See, e.g., Banyard* v. *NLRB,* [505 F.2d 342 (D.C.Cir. 1974)], *supra; cf. Alexander* v. *Gardner-Denver Co.,* 415 U.S. 36 (1974) (rejecting a policy of deference to arbitration awards implicating individual statutory rights under Title VII of the Civil Rights Act).

A. 15a-16a.[8]

In sum, to construct its desired "conflict" among Circuits, Petitioner has employed an incorrect and result-oriented analysis looking not to the harmony of the legal standards, reasoning and approach applied by the courts of appeals, but instead to divergent results caused by the application of common legal standards to cases presenting varying facts.[9]

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[8] This distinction between individual and group rights is one of several grounds which render inapt Local 2's attempted reliance on *Barrentine* v. *Arkansas Freight System, Inc.,* 450 U.S. 728 (1981) and *Alexander* v. *Gardner-Denver Co.,* 415 U.S. 36 (1974). Pet. at 9 n.6. In both *Barrentine* and *Alexander* the importance of protecting the individual employee's statutory right was central to the Court's reasoning. *Barrentine,* 450 U.S. at 743-746; *Alexander,* 415 U.S. at 49-50. Moreover, those cases arose under statutes other than the National Labor Relations Act which are enforced by agencies other than the Board. Unlike the Board, neither the Secretary of Labor nor the Equal Employment Opportunity Commission have adopted a policy of discretionary deferral to arbitration. The wisdom of the Board's deference policy is not, of course, at issue here. The decision below held only that the Board failed to apply it properly.

[9] Local 2 incorrectly relies upon asserted differences of approach by panels in the Third Circuit, Pet. at 11-12, as a basis for certiorari. As Justice Harlan observed, "decisions between different panels of the same Court of Appeals will not be considered to present a reviewable conflict, since such differences of view are deemed an intramural matter to be resolved by the Court of Appeals itself." Harlan, *Manning the Dikes,* 13 Record of N.Y.C.B.A. 541, 552 (1958), cited in Stern and Grossman, *Supreme Court Practice* (5th ed. 1978), at 276 and n.41.

This analysis, coupled with the fact that the bulk of the argument in the Petition (pp. 12-17) is devoted to persuading this Court that the court below erred, suggests that Local 2's "conflict" argument is a smokescreen to conceal the union's true objective: another bite of the apple because it is unhappy with the Arbitrator's decision found by the court below to satisfy the Board's criteria for deference. However, as Justice Rehnquist has observed, quoting Chief Justice Vinson, even had there been error below, certiorari would not necessarily be warranted:

> The Supreme Court is not, and never has been, primarily concerned with the correction of errors in lower court decisions. In almost all cases within the Court's appellate jurisdiction, the petitioner has already received one appellate review of his case. The debates in the Constitutional Convention make clear that the purpose of the establishment of one supreme national tribunal was, in the words of John Rutledge of South Carolina, 'to secure the national rights & uniformity of Judgments.' The function of the Supreme Court is, therefore, to resolve conflicts of opinion on federal questions that have arisen among lower courts, to pass upon questions of wide import under the Constitution, law, and treaties of the United States, and to exercise supervisory power over the lower federal courts. If we took every case in which an interesting legal question is raised, or our *prima facie* impression is that the decision below is erroneous, we could not fulfill the Constitutional and statutory responsibilities placed upon the Court.

Boag v. *MacDougall*, 102 S.Ct. at 702 (Rehnquist J., dissenting), quoting from Address to the American Bar Association, September 7, 1949.

And, as we next show, Local 2's suggestion that the decision below "misconceives the law" is simply inaccurate.

C. *The Decision Below Does Not Misconceive the Law.*

Despite Local 2's strident attack upon the court below, that court did *not* "impermissibly formulate its own standards for deferral. . . ." Pet. at 13. This contention is untenable, for Chief Judge Feinberg was careful to apply strictly the Board's own stated deferral criteria. A. 15a-19a. Far from crafting a new deferral standard, the court below held merely that the Board violated its *own* standards in this particular case.

Local 2 completely overlooks the well-established obligation of courts of appeals to "insure that [the Board] adheres to its own standards until they are properly changed by the Board." *Hawaiian Hauling Service, Ltd.* v. *NLRB,* 545 F.2d at 676. This is precisely the approach followed below: "once the Board has announced a particular set of rules . . . some constraints necessarily arise to limit its discretion in individual cases." A. 17a. Indeed, the Board has likewise recognized that it is "institutionally bound" to adhere to its own precedents. *Sab Harmon Industries, Inc.,* 252 N.L.R.B. No. 132, slip op. at 4 n.2 (1980).

In its quest for a favorable result on the merits, Local 2 urges that courts of appeals abdicate their review responsibilities and simply rubber-stamp Board decisions. This Court has specifically instructed the courts of appeals to resist such a course. *NLRB* v. *Brown,* 380 U.S. 278, 291-292 (1965).

Local 2 also suggests that certiorari should be granted due to the court below's alleged "patent error in its reading of § 8(a)(5)". Pet. at 14. This is not accurate. Local 2 overlooks the critical fact, found by the Arbitrator, that

the C.O.D. collection procedures at issue here do not represent either (1) a change in the salesmen's terms and conditions of employment or (2) a required part of the salesmen's jobs. A. 59a-61a.

At no time have the salesmen been required by the Companies to accept customer payments; alternative arrangements have always been available to the customers. A. 60a-61a. Indeed, even the Board rejected the notion that the Companies "directly pressured the salesmen to collect c.o.d. payments. . . ." A. 28a n.3. Since, as the Arbitrator found, no actual change in the salesmen's required duties was necessitated by the C.O.D. collection procedures, the court of appeals' conclusion that no violation of the contract, past practice or section 8(a)(5) occurred here can hardly be labeled patent error as urged by Local 2.[10]

D. *Local 2 Is Incorrect When It Argues That the Court Below Was Required to Remand.*

A remand to the Board was neither necessary nor appropriate here. In view of the court of appeals' ruling that the Board clearly erred in failing to apply properly its own criteria for arbitral deference, a remand would be "an unnecessary formality." *NLRB* v. *Food Store Employees Union, Local 347,* 417 U.S. 1, 8 (1974). *See Communications Workers* v. *NLRB,* 362 U.S. 479 (1960); *NLRB* v. *Express Publishing Co.,* 312 U.S. 426 (1941). *See also NLRB* v.

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[10] With two exceptions, moreover, the court below did not even discuss the merits of the alleged section 8(a)(5) violation (A. 11a), thus making it difficult to comprehend Local 2's claim that the court misconceived that section. The court did express serious reservation concerning the Board's analysis of the ostensible requirement that salesmen collect payments from C.O.D. customers (A. 18a n.4) and questioned the remedy fashioned by the Board, even assuming the unfair labor practice charges were meritorious. A. 19a.

Yeshiva University, 444 U.S. 672 (1980) (court of appeals may reverse the Board where the Board's decision is based upon "conclusory rationales"). The Board may not ignore an unambiguous legal conclusion rendered by a court of appeals. *See Ithaca College* v. *NLRB,* 623 F. 2d 224, 228 (2d Cir.) *cert. denied sub nom., Ithaca College Faculty Ass'n* v. *NLRB,* 449 U.S. 975 (1980). Consequently, there would simply be nothing for the agency to do on remand. The Board's failure to seek a remand is further evidence that the alleged usurpation of the Board's authority decried by Local 2 is a mirage.

Local 2's reliance upon *NLRB* v. *Food Store Employees Union, Local 347,* is inexplicable. That case does not stand for the broad proposition that a remand is "the required course for the reviewing court," Pet. at 17, and does not mandate a remand in the case at bar. There, inconsistencies in the Board's remedial order prompted the court of appeals to substitute certain additional remedies. This Court reversed, concluding it was error for the court of appeals to "enlarge [the] order without first affording the Board an opportunity to clarify the inconsistencies." 417 U.S. at 8. No comparable inconsistency justifying further Board proceedings exists in this already protracted proceeding. The Board ruled decisively on the deferral question. A. 55a-57a. And it has taken no action indicating a desire to reconsider its unequivocal holding.

Nor is Local 2's request for remand aided by citation to *South Prairie Construction Co.* v. *Operating Engineers, Local 627,* 425 U.S. 800, 805 (1976). That case precludes reviewing courts from preempting administrative prerogatives by making an "initial determination" on the merits of a case. Nowhere in the opinion below is there the slightest intimation that the court intended to—or actually did—"take upon itself the initial determination" of the legality of the C.O.D. collection procedures. The Second Circuit did nothing more than exercise its authority, long recognized and validated by reviewing courts, to determine that the Board had abused its discretion in not deferring to the Arbitrator's award. It was the Arbitrator, not the court, who made the "initial determination" on the merits.

Local 2 misconstrues the power of the court of appeals to order a remand as a requirement that it do so. Neither precedent nor common sense support such a rule. *See Ithaca College* v. *NLRB,* 623 F.2d at 229.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Dated: April 19, 1982
New York, New York

Respectfully submitted,

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Opposition

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No. 81-1544

Supreme Court, U.S.
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Supreme Court of the United States

October Term, 1981

LIQUOR SALESMEN'S UNION OF THE STATE OF NEW YORK LOCAL 2, DISTILLERY, RECTIFYING, WINE AND ALLIED WORKERS INTERNATIONAL UNION, AFL-CIO,
Petitioner,

vs.

CHARMER INDUSTRIES, INC., STAR INDUSTRIES, INC., STANDARD WINE & LIQUOR CO., INC., PEERLESS IMPORTERS, INC., NATIONAL DISTILLERS DISTRIBUTING CO., PARK & TILFORD & MOTEL & CLUB, DIVISIONS OF KNICKERBOCKER LIQUORS CORP., and NATIONAL LABOR RELATIONS BOARD,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION FOR RESPONDENT KNICKERBOCKER LIQUORS CORP.

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the National Labor Relations Board may ignore its own standards for deciding under what circumstances the Board will defer to an arbitrator's findings of fact.

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No. 81-1544

In The

Supreme Court of the United States

October Term, 1981

LIQUOR SALESMEN'S UNION OF THE STATE OF NEW YORK LOCAL 2, DISTILLERY, RECTIFYING, WINE AND ALLIED WORKERS INTERNATIONAL UNION, AFL-CIO,

Petitioner,

vs.

CHARMER INDUSTRIES, INC., STAR INDUSTRIES, INC., STANDARD WINE & LIQUOR CO., INC., PEERLESS IMPORTERS, INC., NATIONAL DISTILLERS DISTRIBUTING CO., PARK & TILFORD & MOTEL & CLUB, DIVISIONS OF KNICKERBOCKER LIQUORS CORP., and NATIONAL LABOR RELATIONS BOARD,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION FOR RESPONDENT KNICKERBOCKER LIQUORS CORP.*

OPINIONS BELOW

The opinions below are set forth in the petitioner's appendix.

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* *Statement Required by Rule 28.1:* Knickerbocker Liquors Corp. is a wholly owned subsidiary of Gil Rosenberg, Inc., a New York corporation.

JURISDICTION

Respondent Knickerbocker does not raise any jurisdictional question.

STATUTES INVOLVED

The statutes involved are set forth in the petition.

COUNTERSTATEMENT OF THE CASE

In 1976, petitioner, a labor organization representing liquor salesmen employed by certain liquor wholesalers, respondents herein, brought an action in United States District Court for the Southern District of New York to compel arbitration of petitioner's claim that the wholesalers had violated the collective bargaining agreements between petitioner and the wholesalers, by instituting certain procedures with respect to the manner in which the wholesalers would handle the accounts of their C.O.D. customers. The District Court ordered that the dispute be submitted to arbitration. In April 1977, the arbitrator held that the procedures instituted by the wholesalers did not impose any new obligation upon the salesmen and, accordingly, did not constitute either a violation of the express terms of the collective bargaining agreements or a change of any established past practice with respect to the salesmen's conditions of employment. (Appendix to Petition, 65a).

After losing the arbitration, petitioner requested the Regional Director of the National Labor Relations Board to reactivate the unfair labor practice charge that had been previously filed by petitioner and held in abeyance by the Regional Director pending issuance of the arbitrator's decision. After lengthy proceedings involving a dismissal of the unfair labor practice charge by the Regional Director on the basis that the arbitration resolved the threshold issue raised by the unfair labor practice charge, a reversal of the dismissal by the Board's Office of Appeals, a denial of the wholesalers' motion for summary judgment and a decision by an Administrative Law Judge, the Board itself issued its decision and order on June 30, 1980. The Board refused to defer to the decision of the arbitrator. The Board held that the wholesalers had violated Sections 8(a)(1) and (5) of the National Labor Relations Act by unilaterally changing their procedures as to C.O.D. customers without prior bargaining with petitioner.

The wholesalers sought review of the Board's decision and order in the Court of Appeals for the Second Circuit on several grounds. The Second Circuit held that (a) the Board has established a policy of deferring to an arbitrator's decision where the arbitrator's decision meets certain standards;[1] (b) the arbitration herein met the Board's standards; (c) the reason given by the Board for refusing to defer to the arbitrator's decision was incorrect; (d) the arbitrator's findings of fact were not repugnant to the purposes of the Act; (e) the arbitrator's findings were necessarily dispositive of the threshold issue in the unfair labor practice proceedings; and (f) that it was, accordingly, an abuse of discretion for the Board to refuse to defer to the arbitrator's findings of fact. Because the Second Circuit reversed the Board on this basis, the Second Circuit did not reach the merits of the other arguments raised by the wholesalers, except that the Second Circuit gave a strong indication that it would have reversed the Board on the merits of the case if the Second Circuit had reached the merits. (18a, n. 4).

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[1] Chief Judge Feinberg's opinion sets forth the history of the Board's various pronouncements as to its deferral policies and concludes that the Board's current standard for deferral is set forth in *Spielberg Manufacturing Co.*, 112 NLRB 1080 (1955), *as modified by Suburban Motor Freight*, 247 NLRB 146 (1980).

The petitioner's Statement of the Case is inaccurate, especially in the assertion that the wholesalers' C.O.D. procedures "required the salesmen to pick up payments prior to delivery from C.O.D. customers who wished prompt shipment of their orders." The question whether the salesmen were ever compelled by the wholesalers to make C.O.D. collections was one of the most fiercely contested issues of fact in the entire course of litigation. Contrary to petitioner's statement, the Board held that the wholesalers had not directly pressured salesmen to collect C.O.D. payments (28a, n. 3). The Board merely theorized that the wholesalers had "utilized the force of circumstances to control the conduct" of their salesmen. The Second Circuit characterized the Board's theory as "questionable" and the product of "cursory analysis." (18a and 19a, n. 4). Thus, on this record, petitioner's bald assertion to this Court that the salesmen were "required" to pick up payments on C.O.D. business is not warranted and is misleading to the Court.

REASONS FOR DENYING THE PETITION

I.

THE BOARD HAS NOT JOINED IN THE PETITION FOR A WRIT OF CERTIORARI.

The Board has primary responsibility for formulating national labor policy under the National Labor Relations Act. The Board has not petitioned for a writ of certiorari nor has the Board joined in the petition prepared by the Union.

The petitioner, quoting from *Phelps Dodge Corp. v. Labor Board,* 313 U.S. 177 (1941), emphasizes that "[t]he Board . . . does not exist for the 'adjudication of private rights;' it acts in a public capacity to give effect to the declared public policy of the Act to eliminate and prevent obstructions to interstate commerce by encouraging collective bargaining." This being so, the fact that the Board is not seeking a writ of certiorari herein places petitioner in the position of either seeking further adjudication of private rights or else seeking to substitute its judgment for that of the Board in the determination of the cases in which the Board should seek a writ of certiorari. This factor militates strongly against granting a writ of certiorari.

II.

THE INSTANT CASE DOES NOT INVOLVE A CONFLICT BETWEEN CIRCUITS.

Petitioner contends that the Court should hear this case because of an alleged conflict between the circuits. Respondent Knickerbocker does not deny that, in other contexts, there may be differences between the circuits with respect to the Board's policy as to arbitration deferral. However, this case does not involve a conflict between the circuits.

Arbitrator Jacobs held as follows:

> "Past practice in the industry did not require the salesmen to collect on their C.O.D. accounts. Present practice is the same. It is the individual salesman who decides for himself whether to do so or not. If he decides to collect, then it is he who is going contrary to past practice and deliberately so. The companies are being consistent. They did not require salesmen to pick up C.O.D.s prior to November 1, 1975 and they have told the salesmen consistently since that they are not obligated to do so." (65a).

Chief Judge Feinberg's opinion states as follows:

> "It is true that the arbitrator did not, in so many words, find that the companies had not refused to bargain over a unilateral change in working conditions, in violation of sections 8(a)(1) and 8(a)(5). Instead he found, as a matter of contract interpretation and in the light of an examination of past practice, that the companies' institution of new procedures after November 1, 1975, did not impose a change in rules. This determination, however, was necessarily dispositive of the statutory issue: if no change in working conditions was imposed, no duty to bargain arose, and no unfair labor practice could have been committed. Because both the contractual and statutory issues rest on the same factual determinations, the arbitrator's better position and expertise as a fact-finder strengthen the case for deference to his findings. Cf. Stephenson v. NLRB, supra, 550 F.2d at 538 n. 4 (9th Cir. 1977)." (15a).

Thus, the heart of this case is the Second Circuit's straightforward view that the Board should, under its *Spielberg* doctrine, have deferred to the arbitrator's findings of fact, which findings of fact are not repugnant to the Act and are dispositive of the threshold statutory issue before the Board. Chief Judge Feinberg's opinion then holds that the reason given by the Board for refusing to defer is incorrect and that the Board abused its discretion by failing to so defer.

Given these basic facts, each of the circuits that petitioner alleges to be in conflict with the Second Circuit would have reached the same result as is reached in Chief Judge Feinberg's opinion.

The facts of this case simply do not call into play any of the purported conflicts between circuits.

To properly analyze the petitioner's contention as to a conflict among the circuits, it should first be observed that the Second Circuit itself has supported the Board's position where, under other circumstances, the Board has refused to defer to an arbitrator's decision. *NLRB v. Owners Maintenance Corp.*, 581 F.2d 44 (1978); *NLRB v. Horn & Hardhart Co.*, 439 F.2d 674 (1971) (Judge Feinberg); *NLRB v. Bell Aircraft*, 206 F.2d 235 (1953). The difference between the results in these earlier Second Circuit decisions and the result in the instant case is based entirely upon the Second Circuit's finding in the instant case that the arbitrator's factual findings are not repugnant to the Act and are necessarily dispositive of the threshold issue in the unfair labor practice proceedings. The differences in result between the instant case and the cases in other circuits relied upon by petitioner may be explained by the same factors.

In *NLRB v. General Warehouse Corp.*, 643 F.2d 965 at 969, footnote 16, the panel majority in the Third Circuit held that the arbitrator's finding of just cause for a discharge "does not automatically dispose of a claim of discrimination."

In *NLRB v. Gould, Inc.*, 638 F.2d 159 (10th Cir. 1980), *cert. denied*, 101 S. Ct. 3065 (1982), the Board did not reject an arbitrator's factual determination, but instead rejected the arbitrator's legal conclusion which, the Tenth Circuit found, "clearly ignore[d] a long line of Board and Court precedent." *Gould, supra*, at 166.

In *Alfred M. Lewis, Inc. v. NLRB*, 587 F.2d 403 (1978), the Ninth Circuit noted that the arbitrators had "concluded that the production quota system was reasonable and that the Company had the right to introduce such a system without prior bargaining with the Union." *Lewis, supra,* at 407. Unlike the instant case, the Ninth Circuit was dealing with an arbitration award which (1) held that there was a change in working conditions and (2) then excused the employer therein from bargaining with respect to such change. This is entirely different from the instant case wherein the Second Circuit recognized that the arbitrator had found no change in the salesmen's conditions of employment.

In *St. Luke's Memorial Hospital, Inc. v. NLRB,* 623 F.2d 1173 (1980), the Seventh Circuit found that the arbitration therein did not satisfy the Board's *Spielberg* standards in that (1) the arbitration proceedings were not fair and regular; (2) the arbitrator's decision was repugnant to the purposes of the Act and (3) the arbitrator's findings were not dispositive of the unfair labor practice charge. *St. Luke's, supra,* at 1178.

Petitioner refers to the three opinions issued by the Third Circuit in *NLRB v. Pincus Brothers, Inc.-Maxwell,* 620 F.2d 367 (1980). The petition does not make clear how a difference of opinion in *Pincus Brothers* is relevant to the question whether a writ of certiorari should be granted in the instant case, but it is clear that the three opinions in *Pincus Brothers* do not constitute a conflict between circuits. Moreover, as pointed out in footnote 3 of Chief Judge Feinberg's opinion, the Third Circuit has, in more recent cases, apparently resolved the differences in these *Pincus Brothers* opinions. The Second and Third Circuits are currently in agreement that in reviewing a Board refusal to defer an arbitration award, the circuits should apply an abuse of discretion standard. It should also be noted that the petitioner urged the Second Circuit to apply the abuse of discretion standard in the instant case,[2] which the Second Circuit subsequently did.

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[2] Petitioner herein was intervenor in the Second Circuit. At page 38 of petitioner's (intervenor's) answering brief in the Second Circuit, petitioner

(Cont'd)

Petitioner is, therefore, hardly in a position to seek certiorari on the basis of whatever disagreement may have previously existed in the Third Circuit as to the abuse of discretion standard.

It is astonishing that petitioner argues that *Pioneer Finishing Corp. v. NLRB,* 667 F.2d 199 (1981), 109 LRRM 2112 (1981) is in conflict with the instant case. In *Pioneer,* Chief Judge Coffin of the First Circuit expressly cites the instant case with approval, and applies the principles set forth in Chief Judge Feinberg's opinion to the facts in *Pioneer.* The result in *Pioneer* differs from the result in the instant case because in *Pioneer* the First Circuit found the arbitrator's findings (1) were not dispositive of the unfair labor practice charge, and (2) were repugnant to the purposes of the Act.

III.

THE SECOND CIRCUIT DID NOT MISCONCEIVE THE NATIONAL LABOR RELATIONS ACT.

In strident rhetoric, petitioner alleges that the Second Circuit "misconceives" entire sections of the National Labor Relations Act by "paying lip service to the Board's deferral requirement," by "patently failing to heed the language of the Act," by "stark second-guessing of the Board's decision," by "turning the *Spielberg/Suburban* doctrine on its head," by "*requiring* the Board to engage in the very impermissible delegation of the Board's exclusive jurisdiction . . . which the Act forbids the Board to do" (emphasis in the original), by "creating a powerful incentive for

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(Cont'd)
(intervenor) stated: "Review by the Court of Appeals in cases raising the deferral issue is limited to determining whether the Board had abused its discretion in refusing to recognize an Arbitrator's Award. . .The discretion of the Board is broad and only where the Board abuses its discretion will the Courts interfere."

constant appellate litigation," by "compounding its misunderstanding of §10(a) of the Act by committing a patent error in its reading of §8(a)(5)," by "failing to proceed in accord with these premises of national labor policy," and by "deciding the case as if no statutory right existed."

Bombast aside, the plain fact of the matter is that the Second Circuit merely held, in accord with the decision of the Board's Regional Director some four years earlier, that the underlying questions were primarily factual issues that the arbitrator was best situated to resolve, and that the arbitrator's decision that no change in working conditions had been imposed was (1) not repugnant to the Act and (2) was necessarily dispositive of the statutory issues. (15a, 16a).

Petitioner's shrill accusations notwithstanding, Chief Judge Feinberg's opinion does not undermine or misconstrue any Board policy but decides the case on a narrow basis:

> "The Board's only rationale for declining to defer was the assertion that the arbitrator had ruled in favor of the companies because the contract between the parties contained no provisions pertaining to the matters at issue herein, and that it precluded consideration of past practices relating to the matter. It is on this basis, therefore, that the Board's decision must be reviewed. And on this basis, we believe the decision constitutes an abuse of discretion. The Board's rationale is simply incorrect; as the excerpts from the arbitrator's decision set out above indicate, the arbitrator plainly did consider past practice relating to C.O.D. collections, concluding that the companies had not departed from past practice." (16a).

IV.

IT IS NOT APPROPRIATE TO REMAND THIS CASE TO THE BOARD.

A. Remand Is Not Appropriate Because Of The Nature Of The Second Circuit's Decision.

The Second Circuit accepted, without qualification, the Board's *Spielberg* doctrine, as modified by the Board in *Suburban Motor Freight, supra.* Beyond that, the Second Circuit indicated that "the Board has wide discretion in defining the circumstances under which it will defer to an arbitration award, or indeed in determining whether it will defer under any circumstances." (17a). Thus, in the instant case the Second Circuit did not attempt to impose any new policy upon the Board. The Second Circuit merely held that the Board did not correctly apply its own policy. (18a). Under these circumstances, remand would be an unnecessary formality. *NLRB v. Food Store Employees Union, Local 347,* 417 U.S. 1 at 8 (1974), *citing NLRB v. Express Publishing Co.,* 312 U.S. 426 (1941); *Communications Workers v. NLRB,* 362 U.S. 479 (1960).

The Court of Appeals is not required to remand simply because the court does not agree with the Board's decision. There are many cases in which remand is not the appropriate action. *Massey Stores, Inc. v. NLRB,* 631 F.2d 328 at 332 (4th Cir. 1980); *NLRB v. Nixon Gear, Inc.,* 649 F.2d 906 at 914 (2nd Cir. 1981); *Ithaca College v. NLRB,* 623 F.2d 224 at 229 (2nd Cir. 1980), *cert. denied,* 449 U.S. 975, 101 S. Ct. 386, ____ L. Ed. (1982); *Texas Instruments, Inc. v. NLRB,* 637 F.2d 822 at 833 (1st Cir. 1980); *Pacific Southwest Airlines v. NLRB,* 587 F.2d 1032 at 1039, n. 13 (9th Cir. 1978).

It is significant that the Board itself did not ask the Second Circuit for remand, did not file a petition for a writ of certiorari and did not join in the Union's petition. The decision of the Second Circuit does not challenge any of the Board's deferral standards in any way. There is no reason to believe that remand would serve any useful purpose in permitting the Board to clarify or restate its deferral policies since clarification or restatement is not necessary. As indicated in the Board's memorandum to this Court, the Board views the case only "as turning on the factual analysis of a particular arbitral decision."

B. A Remand To The Board At This Time Would Be Impractical.

Remand to the Board at this stage of the litigation would be impractical and a waste of judicial time. As shown above, remand would involve only the narrow question whether the Board properly applied its own *Spielberg/Suburban Motor Freight* standard.

Upon remand, the Board could either be persuaded by the rationale of the Second Circuit's decision or could again hold that it should not defer to the arbitrator's decision. In the latter event, the Board's supplementary decision would ultimately come again to the Second Circuit for review. Even if the Second Circuit is satisfied as to the Board's supplementary decision with respect to deferral, the Second Circuit would deny enforcement of the Board's supplementary order on the merits of the case. (18a, n. 4).

The events giving rise to this litigation arose in 1975. The remand which petitioner seeks could easily extend the litigation for several more years. Since the alleged refusal to bargain in 1975, petitioner has had the opportunity to, and has, negotiated two subsequent collective bargaining agreements, in 1978 and in

1981.[3] As Chief Judge Feinberg's opinion points out, there is a "distinct air of unreality" about ordering bargaining that has in fact already occurred in 1978 and in 1981, and in which petitioner failed to achieve its desired results.

C. Petitioner is Estopped From Seeking Remand At This Point.

It is a long standing appellate principle that a litigant may not raise an argument on appeal that the litigant did not raise in the court below.

After issuance of the Second Circuit's decision, the petitioner petitioned the Second Circuit for a rehearing, or, in the alternative, a rehearing *in banc*. At no point in petitioner's fourteen page petition to the Second Circuit, or at any prior stage of the appeal in the Second Circuit, did petitioner argue, or even hint or suggest, that remand rather than denial of enforcement was the only appropriate action for the Second Circuit to take.

Quoting from *South Prairie Construction Co. v. Operating Engineers,* 425 U.S. 800 (1976), petitioner now argues that an outright denial of enforcement is "incompatible with the orderly function of the process of review." But the petitioner's failure to raise its argument as to remand at the Second Circuit offends the same principle in greater degree. By making a motion for rehearing *in banc,* petitioner caused its petition to be referred to every judge in regular active service in the Second Circuit. No such judge requested that a vote be taken upon petitioner's request for rehearing *in banc*. (24a). Petitioner should not be permitted to raise arguments at the Supreme Court which petitioner failed to raise before every judge in active service in the Second Circuit.

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[3] The negotiations in 1981 took place after issuance of the decision of the Second Circuit.

There are occasions when the Supreme Court itself, in dealing with major policy issues, *sua sponte* directs remand to the appropriate administrative agency. *NLRB v. Metropolitan Ins. Co.*, 380 U.S. 438, 444 (1965). There are occasions when the Board itself may decide that it wishes to reconsider an important labor policy and may request the Supreme Court to remand the case to it for further consideration. *Food Store Employees, supra; South Prairie Construction Co., supra.* However, the petitioner herein was a private party intervenor in the Second Circuit. As such, petitioner does not have the Board's standing to determine labor policy. As a private litigant, petitioner should be held to the rules pertaining to the ordinary non-governmental parties and should not be allowed to raise an argument not previously raised in the court below. *Adickes v. Kress & Co.*, 398 U.S. 144 at 147 (1969); *Lawn v. United States*, 355 U.S. 339 at 362, n.16 (1958); *Husty v. United States*, 282 U.S. 694 at 701 (1931).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Opposition

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No. 81-1544

In the Supreme Court of the United States

OCTOBER TERM, 1981

LIQUOR SALESMEN'S UNION OF THE STATE OF NEW YORK,
LOCAL 2, DISTILLERY, RECTIFYING, WINE AND ALLIED
WORKERS INTERNATIONAL UNION, AFL-CIO, PETITIONER

v.

CHARMER INDUSTRIES, INC., ET AL., AND
NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

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Statute:

National Labor Relations Act, 29 U.S.C. 151 *et seq.* :

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  Section 8(a)(5), 29 U.S.C. 158(a)(5) 2, 4

In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1544

LIQUOR SALESMEN'S UNION OF THE STATE OF NEW YORK, LOCAL 2, DISTILLERY, RECTIFYING, WINE AND ALLIED WORKERS INTERNATIONAL UNION, AFL-CIO, PETITIONER

v.

CHARMER INDUSTRIES, INC., ET AL., AND NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

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1. Petitioner (hereafter "Local 2") represents salesmen employed by the respondent companies, who are alcoholic beverage wholesalers in the New York City metropolitan area. The companies' drivers are represented by Local 816 of the International Brotherhood of Teamsters. Under a prior collective bargaining agreement between the companies and Local 816, the drivers bore responsibility for the collection of payments from all C.O.D. customers at the time of delivery. On October 31, 1975, the companies and Local 816 agreed to a new contract that eliminated the drivers' payment collection duties. Although the companies were simultaneously completing separate contract negotiations with Local 2, the companies did not notify Local 2 that

they had eliminated the collection duties of their drivers, and Local 2 therefore did not address the subject of collections before accord on a new contract was reached on November 2, 1975. (Pet. App. 38a-40a).

Shortly thereafter, the companies began instituting new collection procedures for their salesmen. Under the new system, C.O.D. customers were given three payment options: (1) they could mail in checks, with delivery taking place upon receipt (often involving a delay of three days or more); (2) they could leave blank checks on file with the companies (lessening the delay in delivery but creating security problems); or (3) they could give the checks directly to the salesmen, who would arrange for prompt delivery (Pet. App. 27a, 42a).

While the salemen were not required to collect C.O.D. payments from their customers, any salesman unwilling to do so risked loss of his C.O.D. customers to another salesman who was willing to provide this service (Pet. App. 27a). As a result of the new C.O.D. collection procedure, the salesmen's working conditions changed: they worked longer hours, travelled greater distances, exposed themselves to greater risks of theft, and were unable to service the same number of accounts (Pet. App. 28a, 44a-45a).

On November 12, 1975, the president of Local 2 sent a letter to each company protesting that they had "unilaterally and without notice" changed the working conditions of the salesmen by requiring them "to pick up payment in advance from all customers who are on a cash or C.O.D. basis" (Pet. App. 43a). When the companies refused to alter the new payment collection system, the union filed an unfair labor practice charge with the Board, alleging that the companies had unilaterally changed work rules in violation of Section 8(a)(1) and (5) of the National Labor Relations Act, 29 U.S.C. 158(a)(1) and (5). Local 2, however, shortly thereafter withdrew the charge and submitted the dispute to arbitration under procedures provided for in its collective bargaining agreement with the companies (Pet. App. 7a).

On April 7, 1977, the arbitrator issued his decision, holding that "[t]he Employers did not violate their contract with Local 2 when they adopted their present C.O.D. procedures" (Pet. App. 66a). The arbitrator concluded that the companies' action was not precluded by the "direct wording" of the agreement or by "any meaningful concept of past practice" (Pet. App. 64a). Respecting the latter, the arbitrator stated (Pet. App. 65a):

> Past practice in the industry did not require the salesmen to collect on their C.O.D. accounts. Present practice is the same. It is the individual salesman who decides for himself whether to do so or not. * * * The companies are being consistent. They did not require salesmen to pick up C.O.D.'s prior to November 1, 1975 and they have told the salesmen consistently since that they are not obligated to do so.

2. The Union subsequently refiled its unfair labor practice charge with the Board. The Board's Regional Director refused to issue a complaint, finding that "the arbitrator was aware of the unfair labor practice issue" and that his award was "not clearly repugnant to the Act" (Pet. App. 9a). The General Counsel, on appeal, reversed the Regional Director's decision, a complaint was issued, and the companies filed a motion for summary judgment based on the arbitration award. The Board denied the motion, stating (Pet. App. 56a-57a):

> [T]he Arbitrator's Award which is alleged to be dispositive of the matter demonstrates on its face that the Arbitrator ruled in favor of Respondents herein because

> the contract between the parties contained no provisions pertaining to the matters at issue herein, and that it precluded consideration of past practices relating to the matter. Hence, his award that the "Employers did not violate their contract with Local 2 when they adopted their present C.O.D. procedures," does not dispose of the unfair labor practice allegations of the complaint. * * *

On the merits, the Board concluded that the companies unilaterally changed the working conditions of the salesmen because, as a practical matter, they were now required to collect C.O.D. payments. The Board accordingly held that the companies violated Section 8(a)(1) and (5) of the Act by failing to bargain with Local 2 over the changes (Pet. App. 27a-29a). The Board ordered the companies, *inter alia,* to cancel the unilateral collection procedure changes, to reimburse the salesmen for any loss of time or expense incurred as a result of such changes, and to bargain with Local 2 concerning any further changes (Pet. App. 30a, 53a-54a).

3. The court of appeals denied enforcement of the Board's order on the ground that the Board abused its discretion in not deferring to the arbitrator's award (Pet. App. 3a). Applying the standard enunciated by the Board in *Suburban Motor Freight, Inc.*, 247 N.L.R.B. 146 (1980), that it would "no longer honor the results of an arbitration proceeding under *Spielberg*[[1]] unless the unfair labor practice issue before the Board was both presented to and considered by the arbitrator" (Pet. App. 14a), the court concluded that the arbitrator found "as a matter of contract

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[1] In *Spielberg Manufacturing Co.*, 112 N.L.R.B. 1080, 1082 (1955), the Board enunciated a policy of deferring to arbitral awards where "the proceedings appear to have been fair and regular, all parties had agreed to be bound, and the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the Act."

interpretation and in the light of an examination of past practice, that the companies' institution of new procedures after November 1, 1975, did not impose a change in [work] rules." The court held that this determination "was necessarily dispositive of the statutory [unfair labor practice] issue: if no change in working conditions was imposed, no duty to bargain arose, and no unfair labor practice could have been committed"[2] (Pet. App. 15a).

4. While the Board believes that the court of appeals should have upheld its decision, the Board did not file its own petition because it viewed the disagreement between the Board and the appellate court as turning on the factual analysis of a particular arbitral decision—*i.e.*, the court found, contrary to the Board, that the arbitrator had adequately considered all of the factors implicated in the unfair labor practice issue in the course of concluding that the companies had not unilaterally changed the salesmen's

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[2] The court noted that, while the *Spielberg* criteria for deference would not be satisfied if the result reached by the arbitrator were found to be "clearly repugnant" to the Act, the Board had made no such determination here. The Board's only rationale for declining to defer was the assertion that the arbitrator had ruled in favor of the companies " 'because the contract between the parties contained no provisions pertaining to the matters at issue herein, and that it precluded consideration of past practices relating to the matter' " (Pet. App. 16a). The court concluded (*ibid.*):

> The Board's rationale is simply incorrect; as the excerpts from the arbitrator's decision set out above indicate, the arbitrator plainly did consider past practice relating to C.O.D. collections, concluding that the companies had not departed from past practice.

working conditions.[3] However, should the petition be granted, the Board will defend its decision and order.

Respectfully submitted.

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MARCH 1982

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[3] In *Alfred M. Lewis, Inc.*, 229 N.L.R.B. 757, 757-758 (1977), enforced, 587 F. 2d 403 (9th Cir. 1978) (Pet. 10), the Board refused to defer to arbitral awards because the arbitrators found that the employer was entitled to make certain unilateral changes in working conditions simply because the contract did not specifically limit such actions. Here, by contrast, the arbitrator found that, in the light of past practice, there was no unilateral change in working conditions.

Petitioner's Reply Brief

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No. 81-1544

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

LIQUOR SALESMEN'S UNION OF THE STATE OF NEW YORK, LOCAL 2, DISTILLERY, RECTIFYING, WINE AND ALLIED WORKERS INTERNATIONAL UNION, AFL-CIO,
Petitioner,

v.

CHARMER INDUSTRIES, INC., STAR INDUSTRIES, INC., STANDARD WINE & LIQUOR CO., INC., PEERLESS IMPORTERS, INC., NATIONAL DISTILLERS DISTRIBUTING CO., PARK & TILFORD & MOTEL & CLUB, DIVISIONS OF KNICKERBOCKER LIQUORS CORP., and NATIONAL LABOR RELATIONS BOARD,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Secnod Circuit

PETITIONER'S REPLY MEMORANDUM

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PETITIONER'S REPLY MEMORANDUM

I. THE COURT OF APPEALS' RATIONALE IN THIS CASE, NOT THAT OF THE NLRB, IS "SIMPLY INCORRECT"

A. The employer-respondents' principal defense of the decision below is that the Court of Appeals' decision reversing the Board's refusal to defer to the arbitration award here is correct because the arbitrator properly determined that the employers did not make a unilateral change of working conditions regarding COD collections. But this is to ignore, as the Court of Appeals unfortunately also ignored, the essence of the controversy.

After 1975 the salesmen were put to the Hobson's choice they had not faced before between making COD collections from their customers, which "involved added time, expenses and physical danger" (Bd. Dec., Pet. App. 27a), or facing lost commissions if they did not do so by reason of the employers' refusal to make further deliveries if COD moneys were outstanding (*id.* 27a-28a). As the Board properly observed: "where an employer knowingly utilizes the force of circumstances to control the conduct of its employees, the failure to control them with direct orders may become legally insignificant. *Yellow Cab Company*, 229 NLRB 1329 (1977)" (*id.* 28a, n.3). This practice was indisputably a change from prior practice and had no sanction in the collective agreement between petitioner union and the employers. Indeed, it could not have been sanctioned in that agreement, because when that agreement was negotiated the employers concealed from petitioner a concession the employers had made to their drivers, who had a separate bargaining unit represented by a different union, in relieving those employees of their longstanding duty to make COD collections (*id.* 28a). Thus, the employers were clearly guilty of an unfair labor practice:

> In the absence of a specific contract right, the unilateral institution of production or work standards, with accompanying penalties, is a refusal to bargain in violation of Section 8(a)(5) of the Act. [*Alfred M. Lewis, Inc.*, 229 NLRB 757, 758, enforced in pertinent part, 587 F.2d 403 (C.A. 9) (discussed at Pet. 10).]

See also Pet. 14-16, to which the opposing briefs offer no response.

The same unrealistic failure to view the salesmen's working conditions in their entirety is central to the

Court of Appeals' unwarranted overruling of the Board's refusal to defer to the arbitrator's award. The Court of Appeals said:

> The Board's rationale is simply incorrect; as the excerpts from the arbitrator's decision set out above indicate, the arbitrator plainly did consider past practice relating to COD collections, concluding that the companies had not departed from past practice. [A. 16]

Those "excerpts" (set forth at Pet. App. 8a) point out that the employers left the salesmen the "choice" to collect or not collect; it is only on this approach that the arbitrator found that there was no departure from past practice. The quoted passages make it plain that the arbitrator did *not* find that prior to 1975 salesmen were required by the force of circumstances or otherwise to make such collections. And, as we have just shown, the Board did not misread the arbitrator's decision; rather the Board rejected as contrary to basic NLRA principles the critical finding that imposing on salesmen this onerous "choice" saved the change from being a departure from past practice. The Court of Appeals' conclusion that the Board misread the arbitrator's decision is thus based on its own misreading of the Board's decision, as well as on that court's wholly impermissible reliance on the *Regional Director's* determination that the award was not repugnant to the Act (A. 16a). The latter is clearly an error of law, since the Regional Director's decision was reversed by his superior, the General Counsel, who had the statutory power and duty to determine whether complaints should issue (see § 3(d) and 10(b) of the NLRA).[1]

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[1] The Court of Appeals perhaps confused this relationship with that between the Board and its administrative law judges, whose decisions are entitled to weight as part of the entire record open to judicial review under § 10 of the Act. See *Universal Camera Corp.* v. *Labor Board*, 340 U.S. 474, 492-497.

B. At pp. 10-12 of our petition we refer to the "general disarray of the Courts of Appeals" concerning the scope of review of Board determinations that a party who has obtained a favorable arbitration award has nonetheless violated the NLRA. This is confirmed by the pendency in this Court of two petitions to reverse decisions which, contrary to the result below, did enforce Board orders under such circumstances (*Hammermill Paper Co.* v. *NLRB*, No. 81-1438, and *Metropolitan Edison Co.* v. *NLRB*, No. 81-1664), as well as a third case in which notice has been given that such a petition will be filed (*Pioneer Finishing Corp.* v. *NLRB*, No. A-807 due May 22, 1982). The petition in *Hammermill* squarely asserts a conflict with the decision below in this case, and counsel for *Pioneer* has expressed in a letter to this Court (with which we were belatedly served) that he intends to argue that the decision in *Pioneer* and the Second Circuit's decision in this case are in conflict. In our petition at pp. 11-12, we reviewed *Hammermill* and *Pioneer* to demonstrate that the approach to Board non-deferral decisions in the Third and First Circuits is squarely contrary to the approach of the Second Circuit in this case. While the opposition for Charmer Industries *et al.* purports to be baffled by the assertion of a conflict with *Pioneer*, because the court there twice cited the decision herein with approval, those citations concerned only the Second Circuit's very general statement of the applicable standard (see 667 F.2d at 212); and, as we show in our petition, while there is a measure of agreement at that level of abstraction, the different circuits take a very different approach in effectuating that standard. See particularly *Pioneer*, 667 F.2d at 212-213 quoted at Pet. 12. And the Board's description of the present case in its brief in opposition in *Hammermill* neatly focuses on the Second Circuit's error pointed out in point A of this reply brief: "See *Liquor Salesmen's*, 664 F.2d at 325 ([the arbitrator's] determination, however was necessarily dispositive of the statutory issue: if no change in working conditions was imposed, no duty to bargain arose and no unfair labor practice could have been committed)."[2]

Our petition particularly emphasized the conflict between the decision below and that of the Ninth Circuit in *Lewis* because both involve the identical unfair labor practice—a unilateral change of working conditions in violation of § 8(a)(5). The respondent-employers' attempt to distinguish *Lewis* on the basis that the present case turns on a disagreement about the facts between the Board and the Second Circuit is inaccurate for the reasons spelled out at pp. 2-3 hereof. Moreover, the Board itself in its denial of the motion for summary judgment, quoted at Board Mem. 3-4, confirmed that its view of the applicable law is flatly contrary to that taken first by the arbitrator in construing the agreement and then by the Court of Appeals in reversing the Board. The Board adheres to its position in denying the employers' summary judgment as shown by its statement that "the Board will defend its decision and order" if certiorari is granted (*id.* p. 6). That the Board would, as here, resist a grant of certiorari where a court of appeals has incorrectly reversed the Agency was anticipated in *Auto Workers* v. *Scofield*, 382 U.S. 205, where the Court disapproved the Board's submission that intervention in the courts of appeals should be denied to the charging parties who had prevailed in the Agency proceeding:

> The Board also argues that permitting intervention will adversely affect its *tactical* or budgetary decision not to bring a case here for review. But the opportunity is open to the Board to advise this Court whether a case that the intervening charging party brings here is an appropriate vehicle to raise important issues. And Congress has entrusted to this Court, rather than the Labor Board, discretionary

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[2] Brief for the NLRB in Opposition, No. 81-1438, pp. 11-3.

> jurisdiction to review cases decided by the Courts of Appeals. [382 U.S. at 221-222 (emphasis added).]

II. THE COURT OF APPEALS' FAILURE TO REMAND THIS CASE TO THE NLRB WAS MANIFEST ERROR

Only a brief reply to the defense of the Court of Appeals' failure to remand in the face of this Court's unanimous directions to follow such a course[3] is warranted. The employers' contention that a remand would be futile is untenable: Even applying the Second Circuit's approach to deferral, the Board should determine that this is not an appropriate case for deferral; indeed, it is precisely because of the discretionary nature of the deferral decision that the Court of Appeals was required by this Court's *South Prairie* and *Food Employees* decisions (Pet. 17) to return that issue to the Board. Moreover, it was unnecessary to the Board's finding of an unfair labor practice for the Agency to pass on our contention that the employers independently violated § 8(a)(5) by concealing, during their negotiations with the petitioner, that the employers had entered into an agreement with the drivers' union ending the drivers' COD collection responsibility. (Pet. Br. 4; 40a). Plainly, if petitioner had been so notified, it could have bargained for contractual protection for the salesmen's unit. It has, of course, not even been suggested that this issue of concealment was before the arbitrator, or that an arbitrator's approval of such concealment would be other than repugnant to § 8(a)(5). In the absence of a remand, petitioner will have been denied a decision by any tribunal on this theory, and the employers will have successfully violated the principle "deeply rooted in our jurisprudence—that no man may take advantage of his own wrong" (cf. *Glus* v. *Brooklyn Eastern Terminal*, 359 U.S. 231, 232).[4]

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[3] See *N.L.R.B.* v. *Food Store Employees*, 417 U.S. 1; *South Prairie Constr. Co.* v. *Operating Engineers*, 425 U.S. 800.

[4] Since the error first surfaced in the Court of Appeals' decision, respondent Knickerbocker's contention that petitioner is barred

CONCLUSION

For the reasons stated in the petition for a writ of certiorari and herein, the petition should be granted.

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from seeking a remand on jurisdictional grounds is baseless. *Labor Board* v. *Metropolitan Ins. Co.*, 380 U.S. 438, 444, cited in Knickerbocker's opposition (at p. 14) is itself precedent for this Court's reversal of a lower court's failure to remand to the Board, although no remand had been sought in that court.